(3)

No. 97-704

In The

Supreme Court of the United States

October Term, 1997

PHILOMENA DOOLEY, et al.

Petitioners,

v.

KOREAN AIR LINES CO., LTD.

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

JOINT APPENDIX

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Petition For Certiorari Filed October 27, 1997
Certiorari Granted January 9, 1998

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Mar 10	MOTION by deft. KAL for partial summary judgment dismissing claims for pre-death pain and suffering and to preclude expert testimony (pre-death pain and suffering motion). (re: C.A. 83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 85-2788). (md)
	* * *
1993	
Mar 24	MEMORANDUM by pltfs in opposition to KAL's motion regarding the applicable law to the determination of damages; Exhibits (5) (re: C.A. 83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 85-2788). (ks)
	* * *

Apr 2 REPLY BRIEF by deft KAL in support of its motion for partial summary judgment, and to preclude expert testimony. (re: C.A. 83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 85-2788, 85-3444). (ks)

* * *

Apr 2 REPLY MEMORANDUM by KAL in support of its motion regarding the applicable Law to the determination of damages. (re: C.A. 83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 85-2788, 85-3444). (ks)

Apr 8 MEMORANDUM OPINION. (N) (Judge Robinson) (ks)

Apr 8 ORDER that KAL's motion for partial summary judgment, motion in in limine to preclude expert testimony on pre-death pain and suffering, and motion regarding the applicable law are denied; and that KAL's motion in limine to exclude reference to and evidence of KAL's negligence and willful misconduct is granted; that plaintiff's motion for prejudgment interest is granted, with the rate of interest to be determined at a later date. (N) (Judge Robinson) (ks)

Dec 28 MOTION by deft. for a stay. (ks)

Dec 31 MOTION by deft. to vacate and set aside the final judgment on the issue of liability and grant a new trial pursuant to Rule 60(b) of the FRCP; Exhibits (7) (ks)

Jan 5 OPPOSITION by pltf. to deft's motion for stay; exhibits (2). (ks)

Jan 14 REPLY by deft. in support of its motion for a stay. (ks)

Jan 14 STIPULATION filed 1/10/94 extending time until 2/15/94 to oppose KAL's motion to vacate and set aside the final judgment. (N) HOGAN, J. (ks)

* * *

Feb 2 ORDER granting def's motion for stay; and that all proceedings in this Court in this case are Stayed, pending disposition of deft's motion to vacate and set aside the final judgment on the issue of liability and grant a new trial pursuant to FRCP 60(b); and that parties shall appear on said motion 4/22/94 at 10:00 a.m. (N) ROBINSON, J. (ks)

Mar 8 REPLY by Korean Air Lines in support of their motion to vacate and set aside the final judgment on the issue of liability and grant a new trial pursuant to FRCP Rule 60(b); Exhibits (3) (re: C.A. 83-2793; 83-2940; 83-3177; 83-3289; 83-3587; 83-3793; 83-3890; 84-331; 84-332; 84-542; 84-1707; 84-1710; 84-2672; 84-2858; 85-2788; 85-3444) (ks)

* * *

1994

Mar 14 MEMORANDUM filed 2/14/94 by pltfs in opposition to KAL's motion to set aside the Liability judgment. Exhibit (1); Affidavit (1). (ks)

Mar 22 REPLY MEMORANDUM by pltf in opposition to KAL's mtoion to set aside the liability judgment; Attachment. (ks)

Apr. 11 MOTION by Defendant, Korean Air Lines Co., Ltd. to strike Sur-Reply of Plaintiffs filed in copposition to motion to set aside and vacate the final judgment on the issue of liability and grant a new trial pursuant to Fed. R. Civ. Pro. 60(b); exhibit (A), (re: C. A. 83-2793, 83-2940, 83-3177, 83-3289, 83-3587, 83-3793, 83-3890, 84-0331, 84-0332, 84-0542, 84-1707, 84-1710, 84-2672, 84-2858, 85-2788). (gf)

Apr. 13 CERTIFIED copy ORDER OF TRANSFER OR RETRANSFER filed 4/12/94 from Judicial Panel On Multidistrict Litigation transferring or retransferring the actions listed on Schedule A to the District of the District of Columbia, assigned to the Honorable Audrey E. Robinson, Jr., for additional centralized proceedings in this docket; Schedule A. (USDC, CD CA: C.A. 85-70, 85-72, 85-73, 85-77, 85-81, 85-2870, 85-3090, 85-3091, 85-3441)
(USDC, ND CA: C.A. 83-3446, 83-3444
(USDC, MA : C.A. 84-2630
(USDC, ED MI: C.A. 84-2461, 83-3470, 85-1446, 83-3903, 84-3339
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Apr 20 OPPOSITION by pltfs to KAL's motion to strike pltf's Sur-reply. (ks)

* * *

4/22 HEARING: motion of deft to vacate judgment and for new trial heard and taken under advisement: REP: Santa Zizzo ROBINSON, J. (ks)

* * *

July 1 MEMORANDUM OPINION AND ORDER denying KAL's motion to vacate and set aside the final judgment on the issue of liability and grant a new trial pursuant to FRCP 60(b); and denying KAL's motion to strike plaintiffs' sur-reply. (N) ROBINSON, J. (md)

* * *

July 15 MOTION by deft. KAL for final judgment pursuant to FRCP54(b). (ks)

July 25 OPPOSITION by pltf to deft's motion for final judgment. (ks)

July 28 ORDER denying deft's motion for final judgment. (N) ROBINSON, J. (ks)

July 28 NOTICE OF APPEAL by KAL from Order entered 7/1/94; $5.00 filing fee and $100.00 docketing fee paid to U.S. Treasury; Copies mailed to Milton G. Sincoff, Donald Madole, Bennett Boskey, Joseph P. Muenkel, Juanita M. Madole, Kenneth P. Nolan, and Aaron J. Broder. (Applicable in all cases) (ks)

July 28 PRELIMINARY RECORD transmitted to USCA: USCA#_____ (ks)

* * *

9/14/95 - SEE CLOSED DOCKET BOOK FOR ENTRIES PRIOR TO SEPTEMBER 14, 1995 (mbd) [Edit date 12/27/95]

* * *

2/26/96	9	MOTION filed by defendant KOREAN AIR LINES CO. to dismiss all claims for non-pecuniary damages; Exhibit (1) (ks) [Entry date 02/27/96]
3/6/96	10	MEMORANDUM by plaintiff PLAINTIFFS LIAISON in opposition to motion to dismiss all claims for non-pecuniary damages [9-1] by KOREAN AIR LINES CO.; Exhibit (1) (ks) [Entry date 03/07/96]
3/12/96	11	REPLY by defendant KOREAN AIR LINES CO. to response to motion to dismiss all claims for non-pecuniary damages [9-1] by KOREAN AIR LINES CO. (ks) [Entry date 03/13/96]
3/18/96	–	MOTION HEARING before Judge Aubrey E. Robinson Reporter: Ben Leesman (dot)

* * *

6/4/96	14	MEMORANDUM OPINION AND ORDER by Judge Aubrey E. Robinson: granting motion to dismiss all claims for non-pecuniary damages [9-1] by KOREAN AIR LINES CO.; that plaintiff's claims for loss of society damages, mental anguish and grief, and pre-death pain and suffering be and hereby are dismissed with prejudice. (N) (copies filed in 83-2793, 83-2940, 84-331, 84-332, and 84-1710. (N) (dot)

* * *

7/1/96	16	JOINT MOTION by plaintiff PLAINTIFFS LIAISON, defendant KOREAN AIR LINES CO. for order amend Order of 6/4/96 to include statutory language from 28 USC 1292 (fiat) JUDGE ROBINSON (dot)

7/1/96	17	ORDER by Judge Aubrey E. Robinson: granting joint motion for order amend Order of 6/4/96 to include statutory language from 28 USC 1292 [16-1] by KOREAN AIR LINES CO., PLAINTIFFS LIAISON; these cases are stayed until further Order of the Court, amending order [14-1] to state "Certification for Interlocutory Appeal"; that these cases be and hereby are certified for interlocutory appeal pursuant to 28 USC 1292(b) because they involve controlling questions for law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of this litigation. (N) (dot)

* * *

8/29/96	20	CERTIFIED COPY of Order filed in USCA dated 96-8013, granting petition for permission to pursue an interlocutory appeal from the District Court's Order of 6/4/96; the parties may frame the issues in their briefs as they deem appropriate; the Clerk is directed to issue a briefing schedule. (ks) [Entry date 08/30/96]
8/29/96	21	NOTICE OF APPEAL by plaintiff from order [14-1], entered on: 6/4/96; No fees paid; Copies mailed to counsel of record. (ks) [Entry date 09/05/96]
9/5/96	–	TRANSMITTED PRELIMINARY RECORD on appeal [21-1] by PLAINTIFFS LIAISON to U.S. Court of Appeals (ks)
9/27/96	–	USCA #96-5278 assigned for appeal [21-1] by PLAINTIFFS LIAISON (ks) [Entry date 10/01/96]

* * *

RELEVANT DOCKET ENTRIES OF THE
UNITED STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT

DATE	FILINGS-PROCEEDINGS	Filed
(H)07/10/96	5-Petition for Permission to pursue an interlocutory appeal pursuant to 28 U.S.C. 1292(b) (m-09) [23].	
(H)07/16/96	5-Response to Petition for Permission to appeal (m-15) [23].	
(H)08/15/96	Per curiam Order filed that the petition for permission to pursue an interlocutory appeal from the June 4, 1996, be granted insofar as it requests leave to take an appeal from the June 4, 1996 order. The parties may frame the issues in their briefs as they deem appropriate. The Clerk is directed to issue a briefing schedule. (Before Circuit Judges Wald, Ginsburg and Sentelle).	
(H)08/15/96	Clerk's order filed directing the Clerk to transmit to the district court a certified copy of the order issued this date. The district court shall file the order as a notice of appeal pursuant to Fed. R. App. 5, and shall collect the mandatory docketing fee from counsel. Upon payment of the fee, the district court shall certify the preliminary record to this court after which the case will be assigned a regular docket number.	
9/24/96	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant Plaintiffs Liaison Counsel [NOTICE OF APPEAL FROM THE USCA ORDER OF 08/15/96 GRANTING THE 1292(b) PETITION]. [225241-1] (jth)	

9/24/96	SUPPLEMENTAL TRANSMITTAL FROM USDC (Filing Fee for the Notice of Appeal paid on 09/09/96) [225245-1]. (jth)
9/24/96	CLERK'S ORDER filed establishing the initial briefing schedule [225334-1]: Appellant's brief and appendix due 11/4/96; Appellee's brief due 12/4/96; Appellant's reply brief due 12/18/96. (jth)
10/31/96	BRIEF filed by Appellant Plaintiffs Liaison [233230-1]. Copies: 15. Certificate of service date 10/30/96. (lvs)
10/31/96	JOINT APPENDIX filed [233231-1]. Copies: 10. (lvs)
11/13/96	CLERK'S ORDER filed to schedule oral argument [234526-1] before Judge Initials: PMW ARR JLB on 5/6/97. (cwc)
12/5/96	BRIEF field by Appellee Korean Airln Co Ltd [239124-1]. Copies: 15. Certificate of service date 12/4/96. (lvs)
12/18/96	REPLY BRIEF filed by Appellant Plaintiffs Liaison [242006-1]. Copies: 15. Certificate of service date 12/17/96. (lvs)
12/27/96	CORRECTED REPLY BRIEF filed by Appellant Plaintiffs Liaison [242856-1]. Copies: 15. Certificate of service date 12/26/96. (lvs)
4/16/97	PER CURIAM ORDER filed to allocate oral argument times: APET minutes – 15 ERES minutes – 15. [265968-1], one counsel per side to argue. [265968-2] Oral argument scheduled for 5/6/97,

	Form 72 notice of attorney arguing case – [265968-3] due 4/29/97 for Plaintiffs Liaison, for Korean Airln Co Ltd. (cwc)
4/24/97	FORM 72 filed by Attorney Andrew J. Harakas [268541-1] on behalf of appellee Korean Air Lines co., Ltd. (sgh)
4/25/97	FORM 72 filed by Attorney Juanita M. Madole [268519-1] on behalf of appellant Dooley. (sgh)
5/6/97	ORAL ARGUMENT HELD before Wald, Randolph, Buckley. (sgh)
7/11/97	JUDGMENT for the reasons in the accompanying opinion affirming [283906-1]. Before Judges Wald, Randolph, Buckley. (edb)
7/11/97	OPINION (15 pgs) for the Court filed by Judge Randolph. (edb)
7/11/97	CLERK'S ORDER filed that the Clerk is directed to withhold issuance of the mandate pending disposition of any timely petition for rehearing. (edb)
8/7/97	PETITION for rehearing [289269-1] and SUGGESTION, for rehearing in banc [289269-2] (19 copies) filed by Appellant Plaintiffs Liaison (c/s dated 8/6/97) (wmw)
8/28/97	PER CURIAM ORDER filed denying the petition for rehearing [289269-1]. (Mandate may issue on or after 9/5/97). Before Judges Wald, Randolph, Senior Circuit Judge Buckley. (lvs)

8/28/97	PER CURIAM ORDER, In Banc, filed denying the suggestion for rehearing in banc [289269-2]. Before Judges Edwards, Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel, Garland, and Senior Circuit Judge Buckley. (lvs)
9/4/97	MOTION filed (5 copies) by Appellants Philomena Dooley, et al. (certificate of service dated 9/4/97) to stay issuance of the mandate. (lvs)
10/2/97	PER CURIAM ORDER filed granting the motion to stay mandate [295192-1]. The Clerk is directed to withhold issuance of the mandate until 10/24/97. Before Judges Wald, Randolph, Buckley. (lvs)
10/27/97	NOTICE filed by the Clerk, Supreme Court advising of the filing on 10/22/97 and docketing on 10/24/97 of a petition for writ of certiorari. Supreme Court Docket No. 97-704. [305085-1]. (jth)
1/14/98	NOTICE filed by Clerk, Supreme Court, advising of the entry of an order on January 9, 1998, granting certiorari and establishing a briefing schedule. Supreme Court Docket No. 97-704. [323137-1] (jth)

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

PHILOMENA DOOLEY, Personal Representative of the Estate of DR. CECILIO CHUAPOCO, deceased, and natural mother and guardian of and on behalf of, BRENDEN CHUAPOCO, MICHAEL CHUAPOCO, RICHARD CHUAPOCO, EOEN CHUAPOCO, MARIA CHUAPOCO and GRACE CHUAPOCO 419 Palmer Avenue Teaneck, New Jersey 07667 Plaintiff v. KOREAN AIR LINES CO., LTD., THE UNITED STATES OF AMERICA, and JEPPESEN-SANDERSON, INC. Defendants	CIVIL ACTION NO. 83-2793 AMENDED COMPLAINT PLAINTIFF DEMANDS A TRIAL BY JURY (Received January 24, 1984)

ACTION FOR WRONGFUL DEATH
AND SURVIVAL

COMES NOW the plaintiff, PHILOMENA DOOLEY, as Personal Representative of the Estate of DR. CECILIO CHUAPOCO, deceased, by and through her attorneys,

SPEISER, KRAUSE & MADOLE, and sues the defendants KOREAN AIR LINES CO., LTD., THE UNITED STATES OF AMERICA, and JEPPESEN SANDERSON, INC., alleging upon information and belief as follows:

1. Plaintiff, PHILOMENA DOOLEY, is a citizen and resident of the State of New Jersey. Plaintiff is presently in the process of receiving letters of administration from the Surrogates's Court of Bergen County, New Jersey.

2. The defendant Korean Air Lines Inc., is a foreign corporation, incorporated in, and having its principal place of business in a state other than the District of Columbia. Korean Air Lines Inc. is authorized to do, and is doing, business in the District of Columbia.

3. The defendant Jeppesen Sanderson, Inc., is a foreign corporation, incorporated in, and having its principal place of business in a state other than the District of Columbia. Jeppesen Sanderson, Inc., is authorized to do, and is doing, business in the District of Columbia.

4. At all times relevant hereto, there is complete diversity of citizenship between the plaintiff and the defendant KOREAN AIR LINES, CO. LTD. and JEPPESEN SANDERSON, INC., and the matter in controversy exceeds the sum of Ten Thousand ($10,000.00) exclusive of interests and costs.

5. The crash and resulting death which are the basis for this Complaint occurred on the high seas more than a marine league from the shore of any state, the District of Columbia or any territory of the United States.

6. The United States of America is a sovereign and has submitted itself to suit in the United States District

Court for the District of Columbia pursuant to the Suits in Admiralty Act 46 U.S.C. §§ 741-752.

7. This court has jurisdiction of this suit against the defendant KOREAN AIR LINES, CO. LTD., and JEPPESEN SANDERSON, INC., based upon 28 U.S.C. § 1331, § 1332, § 1333, and § 1350 and/or 46 U.S.C. § 761-767.

8. This court has jurisdiction of this suit against defendant THE UNITED STATES OF AMERICA based upon 28 U.S.C. § 1333, 46 U.S.C. §§ 741-752, 761-767, general maritime and admiralty law and pursuant to this court's ancillary and pendant jurisdiction.

FIRST CAUSE OF ACTION AGAINST DEFENDANT KOREAN AIR LINES CO. LTD. FOR WRONGFUL DEATH

9. At all times relevant hereto, the defendant KOREAN AIR LINES CO., LTD., was and is a common carrier in foreign air transportation engaged in the business of transporting persons and property for compensation and hire pursuant to a Foreign Air Carrier permit issued by the United States of America.

10. On August 31, 1983, the defendant KOREAN AIR LINES CO., LTD., owned, operated, maintained and controlled a certain Boeing 747-200 jet aircraft which was being operated as KAL Flight 007, and was the employer of the captain and crew.

11. Prior to August 31, 1983, decedent DR. CECILIO CHUAPOCO purchased a ticket and contract of carriage for KAL 007 which was scheduled to depart from JFK International Airport enroute to Seoul, Korea.

12. On August 31, 1983, through September 1, 1983, at all times relevant hereto, decedent DR. CECILIO CHUAPOCO was a passenger for compensation and hire on KAL Flight 007.

13. On August 31, 1983, through September 1, 1983, at all times relevant hereto, defendant KOREAN AIR LINES CO., LTD. operated, conducted and dispatched Flight 007 from its departure from JFK International Airport to its intermediate stopover at Anchorage, Alaska and, thereafter, from its departure from Anchorage on its enroute flight to Seoul, Korea.

14. At all times relevant hereto, defendant KOREAN AIR LINES CO., LTD., trained, educated and employed the captain of Flight 007, Chun Byung In; the first officer of Flight 007, Dong Hui Sohn; and the flight engineer of Flight 007, Eui Dong Kim. At all times relevant hereto, the aforenamed employees of defendant KOREAN AIR LINES INC., were acting within the course and scope of their employment with defendant KOREAN AIR LINES INC.

15. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, KOREAN AIR LINES CO., LTD., Flight 007 deviated from its assigned international route of flight, R20, which it was required to follow after departure from Anchorage, Alaska while enroute to Seoul, Korea. Flight 007's failure to follow its assigned flight path resulted in its passage over the Kamchatka Peninsula, the Sea of Okhotsk, Sakhalin Island and the Sea of Japan.

16. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet

Socialist Republics (U.S.S.R) controlled the airspace over the Kamchatka Peninsula, the Sea of Okhotsk and Sakhalin Island and published warnings that aircraft flying in that airspace may be fired upon without warning.

17. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics dispatched certain jet fighters to intercept KAL Flight 007.

18. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, KOREAN AIR LINES CO., LTD., Flight 007 was struck by one or more missiles fired by U.S.S.R. interceptor aircraft which caused Flight 007 to crash into the Sea of Japan, resulting in the conscious mental and physical pain, suffering and anguish, and subsequent death, of DR. CECILIO CHUAPOCO.

19. Pursuant to the ticket purchased from defendant KOREAN AIR LINES CO., LTD., and as an air carrier in its status as of August 31, through September 1, 1983, the defendant agreed, and had a duty, to exercise the highest degree of care in transporting the decedent to his destination. The defendent failed to exercise the required degree of care in transporting the decedent, wilfully and wantonly performed hazardous operational acts with the knowledge that said acts were likely to result in injury to the passengers, wilfully performed hazardous operational acts with reckless and wanton disregard for the probable consequences that injury would result to the passengers, and intentionally violated known requirements and standards of care with knowledge that such violations could cause injury to the passengers in the following respects:

(a) by carelessly and wrongfully operating, and/or controlling said aircraft with respect to its piloting, navigating and following international procedures, and/or

(b) by failing to take the reasonable and safe precautions to see that the aircraft was not flown in hazardous airspace, thereby creating a danger and hazard to the passengers in the aircraft when the defendant knew or, in the exercise of reasonable care should have known, that such dangers and hazards were present at the place where the aircraft was shot down, and/or

(c) by failing to take reasonable and safe precautions to see that the aircraft was properly and safely operated on its approved and assigned course of flight, thereby creating a danger and a hazard to the passengers in the aircraft when the defendant knew, or in the exercise of reasonable care should have known, that the dangers and hazards of flight in U.S.S.R. territory existed, and/or

(d) by failing to train and supervise its agents, servants and employees in the reasonable and proper methods of operating, piloting, navigating and controlling the aircraft in general, as to piloting procedures in general and/or as to piloting procedures in operation near U.S.S.R. territory, and/or

(e) by failing to take reasonable and safe precautions to see that the aircraft was in a safe and proper condition to be flown as a common carrier in foreign air transportation when the defendant knew, or in the exercise of reasonable care should have known, that a danger and hazard to the passengers in the aircraft would be

created if the aircraft was not in a reasonably safe and proper condition and/or if it were operated in, over or near U.S.S.R. territory, and/or

(f) by failing to properly and safely operate and/or observe the cockpit instruments in the aircraft in question, including, but not limited to, the inertial navigation units, the weather radar units, and the radio navigation devices, and/or

(g) by failing to properly instruct and train the employees of the defendant, including the crew in question, as to how to properly and safely operate and/or observe and understand the cockpit instruments including, but not limited to, the inertial navigation units, the radar units and the radio navigation units, and the aircraft, and/or

(h) by operating the aircraft into dangerous, hazardous and unsafe conditions, in violation of all reasonable safety regulations, procedures and standards.

20. As a direct and proximate result of the negligent, wrongful and wilful misconduct of the defendant and its wanton disregard for the safety of the passengers, the decedent DR. CECILIO CHUAPOCO was killed and the personal representative is entitled to recover damages for the wrongful death of the decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of FIVE MILLION DOLLARS ($5,000,000.00), and demands same from the defendant, together with costs and interest.

SECOND CAUSE OF ACTION AGAINST DEFENDANT KOREAN AIR LINES CO., LTD.

21. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 20, inclusive, as if fully set forth herein.

22. As a direct and proximate result of the negligent, wrongful and wilful misconduct of the defendant and its wanton disregard for the safety of the passengers, DR. CECILIO CHUAPOCO was caused to suffer serious and grievous conscious mental and physical pain and suffering and fear of impending death, for which plaintiff is entitled to recover damages herein.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TWO MILLION DOLLARS ($2,000,000.00) and demands same from the defendant, together with costs and interests.

THIRD CAUSE OF ACTION AGAINST DEFENDANT UNITED STATES OF AMERICA FOR WRONGFUL DEATH

23. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 18, inclusive, as if fully and completely set forth herein.

24. On and prior to August 31, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, operated and controlled or had access to certain electronic devices capable of radar tracking and listening to radio transmissions from aircraft, including Flight 007 through surface facilities, aircraft and ships in and around the geographical area in which the aircraft in question crashed, as well as in Alaska and its islands.

25. On and prior to August 31 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, by and through various civilian and military agencies, organizations and services, operated and controlled surface and airborne radio, radar and satellite tracking systems which could identify the track of the Flight 007, identify its accurate position and communicate with it during its flight from Anchorage, Alaska until the time of the crash.

26. On and prior to August 31, 1983 through September 1, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, through its military services, operated and controlled RC 135, E-4, E-3 and P-3 aircraft in the area where Korean Airlines Flight 007 operated.

27. On and prior to August 31, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, knew, or in the exercise of reasonable care should have known, that its RC 135 aircraft displayed on radar a return of similar size, shape and speed to the Boeing 747 aircraft, and that the E-4 aircraft was a military version of Boeing 747-200 aircraft, and that B-747 aircraft were utilized by civil air carriers to transport fare paying passengers in Foreign Air Transportation location in the vicinity of the intended, flight path of Flight 007 assigned by the United States of America.

28. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, committed each and all of the negligent acts of omission or commission:

(a) in knowingly deploying its aircraft in geographical and temporal proximity to the departure and route of flight of Flight 007, thereby causing a danger and a hazard to the passengers on board the aircraft which the defendant knew or, in the exercise of reasonable care should have known, were being created inasmuch as defendant knew or should have known that the radar return from its aircraft and Flight 007 would be similarly received on USSR radar and that Flight 007 could be mistaken by the U.S.S.R. as a military aircraft and subjected to fatal defensive measures, and/or

(b) in failing to use available procedures and equipment to track the flight path of Flight 007 against its assigned flight path, thereby failing to advise the flight crew of Flight 007 of the departure of Flight 007 from its assigned course, which it knew, or in the exercise of reasonable care, the utilization of available equipment and proper conduct should have known, was occurring at the time prior to its crash into the Sea of Japan, and/or

(c) in failing to warn the flight crew of Flight 007 or Korean Air Lines officers or agents of the deviation from the assigned flight path which defendant knew, or in the exercise of reasonable care should have known, would create a danger and a hazard to the passengers of KOREAN AIR LINES INC., Flight 007.

29. As a direct and proximate result of the negligent and wrongful acts of the defendant, UNITED STATES OF AMERICA, the decedent DR. CECILIO CHUAPOCO was killed and the personal representative of the estate is entitled to recover damages for the wrongful death of the decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of FIVE MILLION DOLLARS ($5,000,000.00), and demands same from the defendant, together with costs and interest.

FOURTH CAUSE OF ACTION AGAINST DEFENDANT THE UNITED STATES OF AMERICA

30. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 18, and 23 through 28, inclusive, as if fully and completely set forth herein.

31. As a direct and proximate result of the negligent and wrongful acts and omissions of defendant, THE UNITED STATES OF AMERICA, the decedent DR. CECILIO CHUAPOCO was caused to suffer serious and grievous conscious mental and physical pain and suffering and fear of impending death and plaintiff is entitled to recover damages therefore pursuant to general maritime law.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TWO MILLION DOLLARS ($2,000,000.00) and demands same from the defendant together with costs and interest.

FIFTH CAUSE OF ACTION AGAINST DEFENDANT JEPPESEN SANDERSON, INC. FOR NEGLIGENCE

32. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 18 and 23 through 28, inclusive, as if fully and completely set forth herein.

33. Prior to and at all times mentioned herein, defendant, JEPPESEN SANDERSON, INC. was engaged in the business of planning, designing, manufacturing, modifying, inspecting and sale of various types of navigational aids, including enroute charts displaying flight paths or airways for assigned international routes, which it sold and distributed to various airlines and companies throughout the United States of America and the world.

34. Prior to August 31, 1983, JEPPESEN SANDERSON, INC. planned, designed, manufactured and inspected enroute charts for assigned international routes, including R-20, and the subject maps were thereafter sold, and were eventually delivered to Korean Air Lines Co. Ltd for use in its business as a common carrier of passengers and property for hire.

35. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the crew of Korean Air Lines Co. Ltd. Flight 007 utilized such navigational aids produced by defendant, JEPPESEN SANDERSON, INC., including enroute charts for assigned international route R-20, from their departure from JFK International Airport to its intermediate stopover at Anchorage, Alaska and thereafter, from its departure from Anchorage on its enroute flight to Seoul, Korea.

36. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, Korean Air Lines Co. Ltd. Flight 007 deviated from its assigned international route of flight, R20, which it was required to follow after departure from Anchorage, Alaska while enroute to Seoul, Korea. Flight 007's failure to follow its assigned flight

path resulted in its passage over the Kamchatka Peninsula, the Sea of Okhotsk, Sakhalin Island and the Sea of Japan.

37. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics (U.S.S.R) controlled the airspace over the Kamchatka Peninsula, the Sea of Okhotsk and Sakhalin Island and published warnings that aircraft flying in that airspace may be fired upon without warning.

38. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics dispatched certain jet fighters to intercept KAL Flight 007.

39. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, Korean Air Lines Co. Ltd. Flight 007 was struck by one or more missiles fired by U.S.S.R. interceptor aircraft which caused Flight 007 to crash into the Sea of Japan, resulting in the conscious mental and physical pain, suffering and anguish, and subsequent death, of DR. CECILIO CHUAPOCO.

40. Defendant, JEPPESEN SANDERSON, INC., owed a continuing and non-delegable duty to all passengers aboard Korean Air Lines Flight 007 on August 31, 1983 and September 1, 1983, including this plaintiff's decedent, to exercise reasonable diligence and due care in the planning, design, manufacture, modification and inspection of its navigational aids, including enroute charts for route R-20; to develop, prepare, supply and make available to operators of said aircraft all necessary, proper and reasonable instructions, information, advice, limitations, warnings, data and other information so that

said operators might safely operate said aircraft in such a fashion that unreasonable risks and hazards to passengers might be avoided.

41. The death of plaintiff's decedent aboard Korean Air Lines Flight 007 on August 31 and September 1, 1983, was proximately caused by the careless and negligent acts and omissions on the part of the defendant JEPPESEN SANDERSON, INC., its agents, servants and employees and wrongful breach on the part of the defendant JEPPESEN SANDERSON, INC., its agents, servants and employees of its continuing and non-delegable duty hereinbefore described as follows:

(a) in failing to publish or promulgate safe and adequate warnings on its navigation aids for flight in, over or near U.S.S.R. territory; and/or

(b) in failing to adequately and reasonably warn the operators of flights on R-20 of the hazards and dangers associating with piloting and navigating aircraft in hazardous airspace, thereby creating a danger and a hazard to the passengers in the aircraft when the defendant knew, or in the exercise of reasonable care, should have known, that such dangers and hazards were present at the place where the aircraft was shot down; and/or

(c) in failing to take reasonable and safe precautions to clearly designate free flying areas from non-free flying areas on its enroute charts, thereby creating a danger and a hazard to the passengers in the aircraft when defendant knew, or in the exercise of reasonable care, should have known, that the dangers and hazards of flight in, over or near U.S.S.R. territory existed.

42. As a direct and proximate result of the negligent and wrongful misconduct of the defendant, decedent DR. CECILIO CHUAPOCO was killed and the personal representative is entitled to recover damages for the wrongful death of the decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of FIVE MILLION DOLLARS ($5,000,000.00), and demands same from the defendant, together with costs and interest.

SIXTH CAUSE OF ACTION AGAINST JEPPESEN SANDERSON, INC. FOR BREACH OF EXPRESS AND IMPLIED WARRANTIES

43. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 18, 23 through 28, and 33 through 40, inclusive, with the same full force and effect as if fully and completely set forth herein.

44. The defendant JEPPESEN SANDERSON, INC. held itself out to the public, as well as the passengers and users of said enroute charts for assigned international routes including R-20, as possessing superior knowledge and skill in the design, testing, inspection and production of said navigational aids and that this plaintiff's decedent as well as other passengers for hire on said aircraft, relied upon the aforesaid alleged superior knowledge and skill of said defendant, and they had no means of discovering any hidden defects, dangers or inadequacies in said enroute charts.

45. The defendant JEPPESEN SANDERSON, INC. expressly and impliedly warranted to all users, operators

and passengers on flights which utilized said charts, that said enroute charts were free from any and all hidden defects and dangers, and contained all necessary data, advice, instructions, limitations, warnings and other information and were otherwise of merchantable quality and fit for the purpose for which they were planned, designed, manufactured, assembled, tested, sold and intended to be used.

46. The defendant JEPPESEN SANDERSON, INC. breached its aforesaid warranties in that the said enroute charts, including the chart for R-20, were not free from hidden defects and dangers, and were not of merchantable quality, nor adequate nor fit for the purposes for which they were planned, designed, tested, inspected, produced, sold and intended to be used, and that said accident, and the resulting death of plaintiff's decedent, were caused as a direct and proximate result of said breach of warranties.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of FIVE MILLION DOLLARS ($5,000,000.00) and demands same from the defendant together with costs and interest.

SEVENTH CAUSE OF ACTION AGAINST JEPPESEN SANDERSON, INC. IN STRICT LIABILITY

47. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 18, 23 through 28, 33 through 40, and 44 through 45, inclusive, with the same full force and effect as if fully and completely set forth herein.

48. Defendant JEPPESEN SANDERSON, INC. is strictly liable to the plaintiff in that its enroute charts for assigned international routes, including R-20, were defective, dangerous and unreasonably inadequate, which condition was unknown to plaintiff's decedent, and which was a proximate cause of the accident herein and the resulting death of plaintiff's decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of FIVE MILLION DOLLARS ($5,000,000.00) and demands same from the defendant, together with costs and interest.

EIGHTH CAUSE OF ACTION AGAINST JEPPESEN SANDERSON, INC.

49. Plaintiff repeats, reiterates and realleges each and every allegation contained in paragraphs 1 through 18, 23 through 28, 33 through 40, 44 through 45, and 48, inclusive with the same full force and effect as if fully and completely set forth herein.

50. As a direct and proximate result of the negligent and wrongful acts and omissions of the defendant JEPPESEN SANDERSON, INC. the decedent, DR. CECILIO CHUAPOCO, was caused to suffer serious and grievous conscious mental and physical pain and suffering, and fear of impending death, and plaintiff is entitled to recover damages therefore pursuant to general maritime law and applicable survival statutes.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TWO MILLION DOLLARS ($2,000,000.00) and demands same from the defendant, together with costs and interests.

NINTH CAUSE OF ACTION AGAINST JEPPESEN SANDERSON, INC. FOR PUNITIVE DAMAGES

51. Plaintiff repeats and realleges each and every allegation contained in paragraphs 1 through 18, 23 through 28, 33 through 40, 44 through 45, 48 and 50, inclusive, with the same full force and effect as if fully and completely set forth herein.

52. Defendant, JEPPESEN SANDERSON, INC., a corporation, by its agents and servants was guilty of reckless, wilful and wanton acts and omissions which evidenced a total and conscious disregard of the safety of the passengers on board Korean Air Lines Flight 007 on August 31 and September 1, 1983, a flight which utilized enroute charts produced by defendant, and which proximately caused the death of the plaintiff's decedent.

53. The reckless, wilful and wanton conduct which evidenced a total and conscious disregard for the safety of plaintiff's decedent under the foregoing circumstances justifies an award of punitive damages.

WHEREFORE, for the foregoing reasons, plaintiff seeks, in addition to the compensatory damages claimed herein, an additional award of TEN MILLION DOLLARS ($10,000,000.00) as punitive damages.

FOR THE FOREGOING REASONS, the plaintiff demands judgment of the defendants, jointly and severally, for compensatory damages of FIVE MILLION DOLLARS ($5,000,000.00) for wrongful death and TWO MILLION DOLLARS ($2,000,000.00) for decedent's survival action, together with costs and interest as well as for punitive damages in the amount of TEN MILLION DOLLARS ($10,000,000.00), together with interest and

costs and demands a trial by jury of all issues triable as of right by jury herein.

Respectfully submitted,

SPEISER, KRAUSE & MADOLE
1216 Sixteenth Street, NW
Washington, D.C. 20036
(202) 223 8501

By /s/ Donald W. Madole
DONALD W. MADOLE
and

by /S/ Juanita M. Madole
JUANITA M. MADOLE

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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

PHILOMENA DOOLEY, Personal Representative of the Estate of DR. CECILIO CHUAPOCO, deceased, and natural mother and guardian of, and on behalf of, BRENDEN CHUAPOCO, MICHAEL CHUAPOCO, RICHARD CHUAPOCO, EOEN CHUAPOCO, MARIA CHUAPOCO and GRACE CHUAPOCO 419 Palmer Avenue Teaneck, New Jersey 07667 Plaintiff v. KOREAN AIR LINES CO., LTD., THE UNITED STATES OF AMERICA, and JEPPESEN-SANDERSON, INC. Defendants	:	CIVIL ACTION NO. 83-2793 Judge Aubrey E. Robinson, Jr. **ANSWER TO AMENDED COMPLAINT**

KOREAN AIR LINES, LTD. (hereinafter KAL), by its attorneys, CONDON & FORSYTH, for its Answer to the Amended Complaint herein:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 1, 3, 4, 5, 6, 7 and 8 of the Amended Complaint.

2. Denies the allegations in paragraph 2 of the Amended Complaint, except that it admits that defendant KAL is a foreign corporation duly organized and existing under the laws of the Republic of South Korea which does business in the District of Columbia.

AS TO THE FIRST
CAUSE OF ACTION

3. Denies the allegations in paragraphs 9, 10 and 14 of the Amended Complaint, except that it admits that on September 1, 1983 defendant KAL owned and operated a certain Boeing 747 model aircraft, which was being operated as its regularly scheduled Flight No. KE 007 from New York, New York, U.S.A. to Seoul, South Korea, when it was shot down over the sea of Japan and further admits that the members of the flight crew of said flight were employees of defendant KAL.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 11, 12, 16, 17 and 18 of the Amended Complaint.

5. Denies the allegations in paragraphs 15, 19 and all its subparts, and 20 of the Amended Complaint.

AS TO THE SECOND
CAUSE OF ACTION

6. Answering paragraph 21 of the Amended Complaint, defendant KAL repeats, reiterates and realleges

each and every answer to the allegations in paragraph 1 through 20 of the Complaint with the same force and effect as if set forth herein fully and at length.

7. Denies the allegations in paragraph 22 of the Amended Complaint.

AS TO THE THIRD
CAUSE OF ACTION

8. The allegations in the Third Cause of Action of the Complaint are not directed to defendant KAL and therefore KAL makes no answer with respect thereto.

AS TO THE FOURTH
CAUSE OF ACTION

9. The allegations in the Fourth Cause of Action of the Complaint are not directed to defendant KAL and therefore KAL makes no answer with respect thereto.

AS TO THE FIFTH
CAUSE OF ACTION

10. Answering paragraph 32 of the Amended Complaint, defendant KAL repeats, reiterates and realleges each and every answer to the allegations in paragraphs 1 through 31 of the Amended Complaint with the same force and effect as if set forth herein fully and at length.

11. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 33, 34, 35 and 37 through 42 of the Amended Complaint.

12. Denies the allegations in paragraph 36 of the Amended Complaint.

AS TO THE SIXTH
CAUSE OF ACTION

13. The allegations in the Sixth Cause of Action of the Amended Complaint are not directed to defendant KAL and therefore defendant KAL makes no answer with respect thereto.

AS TO THE SEVENTH
CAUSE OF ACTION

14. Answering paragraph 47 of the Amended Complaint, defendant KAL repeats, reiterates and realleges each and every answer to the allegations in paragraphs 1 through 46 of the Amended Complaint with the same force and effect as if set forth herein fully and at length.

15. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph 48 of the Amended Complaint.

AS TO THE EIGHTH
CAUSE OF ACTION

16. The allegations in the Eighth Cause of Action of the amended Complaint are not directed to defendant KAL and therefore KAL makes no answer with respect thereto.

AS TO THE NINTH
CAUSE OF ACTION

17. Answering paragraph 51 of the Amended Complaint, defendants KAL repeats, reiterates and realleges each and every answer to the allegations in paragraphs 1 through 50 of the Amended Complaint with the same force and effect as if set forth herein fully and at length.

18. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 52 and 53 of the Amended Complaint.

AS AND FOR A FIRST SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

19. The Amended Complaint fails to state a claim against defendant KAL upon which relief can be granted.

AS AND FOR A SECOND SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

20. Plaintiff lacks the capacity to bring this action.

AS AND FOR A THIRD SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

21. The Amended Complaint should be dismissed pursuant to rules 12(b)(7) and 19(a) of the Federal Rules of Civil Procedure for failure to join a necessary party plaintiff.

AS AND FOR A FOURTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

22. The Amended Complaint should be dismissed pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure and Section 1391 of Title 28 of the United States Code for lack of proper venue.

AS AND FOR A FIFTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

23. The Amended Complaint should be dismissed pursuant to the doctrine of *forum non conveniens.*

AS AND FOR A SIXTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

24. The liability of defendant KAL, if any, with respect to the death of the plaintiff's decedent is limited in accordance with the provisions of the Warsaw Convention, defendant KAL's conditions of carriage and tariffs, and defendant KAL's counterpart to CAB Agreement No. 18900, to an aggregate sum not in excess of $75,000.

AS AND FOR A SEVENTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

25. This Court lacks subject matter jurisdiction over this action as none of the four places specified in Article 28(1) of the Warsaw Convention, where this action must be brought, is in the United States.

AS AND FOR A EIGHTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

26. Pursuant to Article 20 of the Warsaw Convention, defendant KAL is not liable to the plaintiff herein because KAL, through its officers, agents and employees, took all necessary measures to avoid the damage allegedly sustained by plaintiff herein or because it was impossible for KAL, through its officers, agents and employees to take such measures.

NOTICE OF APPLICABILITY OF FOREIGN LAW

Pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, defendant KAL hereby gives notice that it intends to raise issues concerning the law of a foreign country in this matter.

WHEREFORE, defendant KOREAN AIR LINES CO., LTD. demands judgment dismissing the Amended Complaint, with costs and disbursements, or if such relief not be granted, that defendant KOREAN AIR LINES CO., LTD.'s liability be limited as prayed herein.

Dated: Washington, D.C.
February 14, 1984

CONDON & FORSYTH
1030 Fifteenth Street, N.W.
Washington, D.C. 20005
(202) 289-0500

By /s/ George N. Tompkins, Jr.
George N. Tompkins, Jr.
Attorneys for Defendant
KOREAN AIR LINES
CO., LTD.

TO: Speiser, Krause & Madole
1216 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for Plaintiffs

Mark A. Dombroff, Esq.
Director, Torts Branch
The Justice Department
Civil Division
Washington, D.C. 20530

Attorneys for the
United States of America

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ANSWER TO AMENDED COMPLAINT was this 14th day of February, 1984, served by first class mail upon the following:

SPEISER, KRAUSE & MADOLE
1216 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for Plaintiffs

Mark A. Dombroff, Esq.
Director, Torts Branch
The Justice Department
Civil Division
Washington, D.C. 20530

Attorneys for the
United States of America

/s/ Kerry O'Hanlon

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

KIMBERLY S. SAAVEDRA, as Special Administrator of the Estate of JAN INGVAR ROLAND HJALMARSSON, Deceased, and as Personal Representative of OLGA HJALMARSSON, OLIVIA HJALMARSSON, a minor, and ALEXANDER HJALMARSSON, a minor 412 W. 4th Street, Suite 206 Santa Ana, California 92701 Plaintiff, v. KOREAN AIR LINES, INC. and THE UNITED STATES OF AMERICA, Defendants.	MDL Docket No. 565 Civil Action No. 83-2940 AMENDED COMPLAINT PLAINTIFF DEMANDS A TRIAL BY JURY (Filed Sept. 26, 1985)

ACTION FOR WRONGFUL DEATH
AND SURVIVAL

COMES NOW the plaintiff, KIMBERLY S. SAAVEDRA, as Special Administrator of the Estate of JAN INGVAR ROLAND HJALMARSSON, deceased, by and through her attorneys, SPEISER, KRAUSE & MADOLE, and sues the defendants KOREAN AIR LINES, INC. and THE UNITED STATES OF AMERICA, alleging upon information and belief as follows:

1. Plaintiff, KIMBERLY S. SAAVEDRA, is a citizen and resident of the State of California. Plaintiff KIMBERLY S. SAAVEDRA was appointed as the Special Administrator of the Estate of JAN INGVAR ROLAND HJALMARSSON by the Superior Court, Orange County, California on August 19, 1985.

2. The defendant Korean Air Lines, Inc., is a foreign corporation, incorporated in, and having its principal place of business in a state other than the District of Columbia. Korean Air Lines, Inc. is authorized to do, and is doing, business in the District of Columbia.

3. At all times relevant hereto, there is complete diversity of citizenship between the plaintiff and the defendant KOREAN AIR LINES, INC., and the matter in controversy exceeds the sum of Ten Thousand Dollars ($10,000.00) exclusive of interest and costs.

4. The crash and resulting death which are the basis for this Complaint occurred on the high seas more than a marine league from the shore of any state, the District of Columbia or any territory of the United States.

5. The United States of America is a sovereign and has submitted itself to suit in the United States District Court for the District of Columbia pursuant to the Suits in Admiralty Act 46 U.S.C. §§ 741-752.

6. This court has jurisdiction of this suit against the defendant KOREAN AIR LINES, INC., based upon 28 U.S.C. § 1331, § 1332, § 1333 and § 1350, and/or 46 U.S.C. § 761-767.

7. This court has jurisdiction of this suit against defendant THE UNITED STATES OF AMERICA based

upon 28 U.S.C. § 1333, 46 U.S.C. §§ 741-752, 761-767, general maritime and admiralty law and pursuant to this court's ancillary and pendant jurisdiction.

FIRST CAUSE OF ACTION AGAINST DEFENDANT KOREAN AIR LINES, INC. FOR WRONGFUL DEATH

8. At all times relevant hereto, the defendant KOREAN AIR LINES, INC., was and is a common carrier in foreign air transportation engaged in the business of transporting persons and property for compensation and hire pursuant to a Foreign Air Carrier permit issued by the United States of America.

9. On August 31, 1983, the defendant KOREAN AIR LINES, INC. owned, operated, maintained and controlled a certain Boeing 747-200 jet aircraft which was being operated as KAL Flight 007, and was the employer of the captain and crew.

10. Prior to August 31, 1983, decedent JAN INGVAR ROLAND HJALMARSSON purchased a ticket and contract of carriage for KAL 007 which was scheduled to depart from JFK International Airport enroute to Seoul, Korea.

11. On August 31, 1981 [sic], through September 1, 1983, at all times relevant hereto, decedent JAN INGVAR ROLAND HJALMARSSON was a passenger for compensation and hire on KAL Flight 007.

12. On August 31, 1983, through September 1, 1983, at all times relevant hereto, defendant KOREAN AIR LINES, INC., operated, conducted and dispatched Flight 007 from its departure from JFK International Airport to

its intermediate stopover at Anchorage, Alaska and, thereafter, from its departure from Anchorage on its enroute flight to Seoul, Korea.

13. At all times relevant hereto, defendant KOREAN AIR LINES, INC., trained, educated and employed the captain of Flight 007, Chun Byung In; the first officer of Flight 007, Dong Hui Sohn; and the flight engineer of Flight 007, Eui Dong Kim. At all times relevant hereto, the aforenamed employees of defendant KOREAN AIR LINES, INC., were acting within the course and scope of their employment with defendant KOREAN AIR LINES, INC.

14. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, KOREAN AIR LINES, INC. Flight 007 deviated from its assigned international route of flight, R20, which it was required to follow after departure from Anchorage, Alaska while enroute to Seoul, Korea. Flight 007's failure to follow its assigned flight path resulted in its passage over the Kamchatka Peninsula, the Sea of Okhotsk, Sakhalin Island and the Sea of Japan.

15. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics (U.S.S.R) controlled the airspace over the Kamchatka Peninsula, the Sea of Okhotsk and Sakhalin Island and published warnings that aircraft flying in that airspace may be fired upon without warning.

16. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics dispatched certain jet fighters to intercept KAL Flight 007.

17. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, KOREAN AIR LINES, INC., Flight 007 was struck by one or more missiles fired by U.S.S.R. interceptor aircraft which caused Flight 007 to crash into the Sea of Japan, resulting in the conscious mental and physical pain, suffering and anguish, and subsequent death, of JAN INGVAR ROLAND HJALMARSSON.

18. Pursuant to the ticket purchased from defendant KOREAN AIR LINES, INC., and as an air carrier in its status as of August 31, through September 1, 1983, the defendant agreed, and had a duty, to exercise the highest degree of care in transporting the decedent to his destination. The defendant failed to exercise the required degree of care in transporting the decedent, willfully and wantonly performed hazardous operational acts with the knowledge that said acts were likely to result in injury to the passengers, willfully performed hazardous operational acts with reckless and wanton disregard for the probable consequences that injury would result to the passengers, and intentionally violated known requirements and standards of care with knowledge that such violations could cause injury to the passengers in the following respects:

(a) by carelessly and wrongfully operating, and/or controlling said aircraft with respect to its piloting, navigating and following international procedures, and/or

(b) by failing to take the reasonable and safe precautions to see that the aircraft was not flown in hazardous airspace, thereby creating a danger and hazard to the passengers in the aircraft when the defendant knew or, in

the exercise of reasonable care should have known, that such dangers and hazards were present at the place where the aircraft was shot down, and/or

(c) by failing to take reasonable and safe precautions to see that the aircraft was properly and safely operated on its approved and assigned course of flight, thereby creating a danger and a hazard to the passengers in the aircraft when the defendant knew, or in the exercise of reasonable care should have known, that the dangers and hazards of flight in U.S.S.R. territory existed, and/or

(d) by failing to train and supervise its agents, servants and employees in the reasonable and proper methods of operating, piloting, navigating and controlling the aircraft in general, as to piloting procedures in general and/or as to piloting procedures in operation near U.S.S.R. territory, and/or

(e) by failing to take reasonable and safe precautions to see that the aircraft was in a safe and proper condition to be flown as a common carrier in foreign air transportation when the defendant knew, or in the exercise of reasonable care should have known, that a danger and hazard to the passengers in the aircraft would be created if the aircraft was not in a reasonably safe and proper condition and/or if it were operated in, over or near U.S.S.R. territory, and/or

(f) by failing to properly and safely operate and/or observe the cockpit instruments in the aircraft in question, including, but not limited to, the inertial navigation units, the weather radar units, and the radio navigation devices, and/or

(g) by failing to properly instruct and train the employees of the defendant, including the crew in question, as to how to properly and safely operate and/or observe and understand the cockpit instruments including, but not limited to, the inertial navigation units, the radar units and the radio navigation units, and the aircraft, and/or

(h) by operating the aircraft into dangerous, hazardous and unsafe conditions, in violation of all reasonable safety regulations, procedures and standards.

19. As a direct and proximate result of the negligent, wrongful and willful misconduct of the defendant and its wanton disregard for the safety of the passengers, the decedent JAN INGVAR ROLAND HJALMARSSON was killed and the personal representative is entitled to recover damages for the wrongful death of the decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TEN MILLION DOLLARS ($10,000,000.00), and demands same from the defendant, together with costs and interest.

SECOND CAUSE OF ACTION AGAINST DEFENDANT KOREAN AIR LINES, INC.

20. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 19, inclusive, as if fully set forth herein.

21. As a direct and proximate result of the negligent, wrongful and willful misconduct of the defendant and its wanton disregard for the safety of the passengers, JAN INGVAR ROLAND HJALMARSSON, was caused to

suffer serious and grievous conscious mental and physical pain and suffering and fear of impending death, for which plaintiff is entitled to recover damages herein.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TWO MILLION DOLLARS ($2,000,000.00) and demands same from the defendant, together with costs and interest.

THIRD CAUSE OF ACTION AGAINST DEFENDANT UNITED STATES OF AMERICA FOR WRONGFUL DEATH

22. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 17, inclusive, as if fully and completely set forth herein.

23. On and prior to August 31, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, operated and controlled or had access to certain electronic devices capable of radar tracking and listening to radio transmissions from aircraft, including Flight 007 through surface facilities, aircraft and ships in and around the geographical area in which the aircraft in question crashed, as well as in Alaska and its islands.

24. On and prior to August 31 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, by and through various civilian and military agencies, organizations and services, operated and controlled surface and airborne radio, radar and satellite tracking systems which could identify the track of the Flight 007, identify its accurate position and communicate with it during its flight from Anchorage, Alaska until the time of the crash.

25. On and prior to August 31, 1983 through September 1, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, through its military services, operated and controlled RC 135, E-4, E-3 and P-3 aircraft in the area where Korean Airlines Flight 007 operated.

26. On and prior to August 31, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, knew, or in the exercise of reasonable care should have known, that its RC 135 aircraft displayed on radar a return of similiar size, shape and speed to the Boeing 747 aircraft, and that the E-4 aircraft was a military version of Boeing 747-200 aircraft, and that B-747 aircraft were utilized by civil air carriers to transport fare paying passengers in Foreign Air Transportation in the vicinity of the intended flight path of Flight 007, assigned by the United States of America.

27. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the defendant, UNITED STATES OF AMERICA, committed each and all of the negligent acts of omission or commission:

(a) in knowingly deploying its aircraft in geographical and temporal proximity to the departure and route of flight of [sic] Flight 007, thereby causing a danger and a hazard to the passengers on board the aircraft which the defendant knew or, in the exercise of reasonable care should have known, were being created inasmuch as defendant knew or should have known that the radar return from its aircraft and Flight 007 would be similarly received on USSR radar and that Flight 007 could be

mistaken by the U.S.S.R. as a military aircraft and subjected to fatal defensive measures, and/or

(b) in failing to use available procedures and equipment to track the flight path of Flight 007 against its assigned flight path, thereby failing to advise the flight crew of Flight 007 of the departure of Flight 007 from its assigned course, which it knew, or in the exercise of reasonable care, the utilization of available equipment and proper conduct should have known, was occurring at the time prior to its crash into the Sea of Japan, and/or

(c) in failing to warn the flight crew of Flight 007 or Korean Air Lines officers or agents of the deviation from the assigned flight path which defendant knew, or in the exercise of reasonable care should have known, would create a danger and a hazard to the passengers of KOREAN AIR LINES, INC., Flight 007.

28. As a direct and proximate result of the negligent and wrongful acts of the defendant, UNITED STATES OF AMERICA, the decedent JAN INGVAR ROLAND HJALMARSSON was killed and the personal representative of the estate is entitled to recover damages for the wrongful death of the decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TEN MILLION DOLLARS ($10,000,000.00), and demands same from the defendant, together with costs and interest.

FOURTH CAUSE OF ACTION AGAINST DEFENDANT THE UNITED STATES OF AMERICA

29. Plaintiff repeats, reasserts and realleges each and every allegation contained in paragraphs 1 through 17, and 22 through 27, inclusive, as if fully and completely set forth herein.

30. As a direct and proximate result of the negligent and wrongful acts and omissions of defendant, THE UNITED STATES OF AMERICA, the decedent JAN INGVAR ROLAND HJALMARSSON was caused to suffer serious and grievous conscious mental and physical pain and suffering and fear of impending death and plaintiff is entitled to recover damages therefore pursuant to general maritime law.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TWO MILLION DOLLARS ($2,000,000.00) and demands same from the defendant together with costs and interest.

FOR THE FOREGOING REASONS, the plaintiff demands judgment of the defendants, jointly and severally, for damages of TEN MILLION DOLLARS ($10,000,000.00) for wrongful death and TWO MILLION DOLLARS ($2,000,000.00) for decedent's conscious physical and mental pain and suffering, together with costs

and interest and demands a trial by jury of all issues triable as of right by jury herein.

Respectfully submitted
SPEISER, KRAUSE & MADOLE
1216 Sixteenth Street, NW
Washington, D.C. 20036
(202) 223-8501

/s/ By Donald W. Madole
DONALD W. MADOLE

and

/s/ By Juanita M. Madole
JUANITA M. MADOLE

Of Counsel:
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and

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and

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New York, New York 10166
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UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

KIMBERLY S. SAAVEDRA, as Special Administrator of the Estate of JAN INGVAR ROLAND HJALMARSSON, deceased, and as Personal Representative of Olga Hjalmarsson, for Olivia Hjalmarsson, a minor, and Alexander Hjalmarsson, a minor, 412 W. 4th Street, Suite 206, Santa Ana, Ca. 92701 Plaintiff, v. KOREAN AIR LINES, CO., LTD., THE UNITED STATES OF AMERICA, Defendants.	Civil Action No. 83-2940 Judge Aubrey E. Robinson, Jr. AMENDED ANSWER TO AMENDED COMPLAINT (Filed Oct. 17, 1985)

KOREAN AIR LINES CO., LTD. (hereinafter KAL), by its attorneys, CONDON & FORSYTH, for its Amended Answer to the Amended Complaint herein:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 1, 3, 4, 5, 6 and 7 of the Amended Complaint.

2. Denies the allegations in paragraph 2 of the Amended Complaint, except that it admits that defendant KAL is a foreign corporation duly organized and existing

under the laws of the Republic of South Korea with its principal place of business in Seoul, South Korea, which does business in the District of Columbia.

AS TO THE FIRST
CAUSE OF ACTION

3. Denies the allegations in paragraphs 8, 9, 12 and 13 of the Amended Complaint, except that it admits that on September 1, 1983 defendant KAL owned and operated a certain Boeing 747 model aircraft, which was being operated as its regularly scheduled Flight No. KE 007 from New York, New York, U.S.A. to Seoul, South Korea, when it was shot down over the Sea of Japan and further admits that the members of the flight crew of said flight were employees of defendant KAL.

4. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs 10, 11, 15, 16 and 17 of the Amended Complaint.

5. Denies the allegations in paragraphs 14, 18, and all its subparts, and 19 of the Amended Complaint.

AS TO THE SECOND
CAUSE OF ACTION

6. Answering paragraph 20 of the Amended Complaint, defendant KAL repeats, reiterates and realleges each and every answer to the allegations in paragraphs 1 through 19 of the Amended Complaint with the same force and effect as if set forth herein fully and at length.

7. Denies the allegations in paragraph 21 of the Amended Complaint.

AS TO THE THIRD
CAUSE OF ACTION

8. The allegations in the Third Cause of Action of the Amended Complaint are not directed to defendant KAL and therefore KAL makes no answer with respect thereto.

AS TO THE FOURTH
CAUSE OF ACTION

9. The allegations in the Fourth Cause of Action of the Amended Complaint are not directed to defendant KAL and therefore KAL makes no answer with respect thereto.

AS AND FOR A FIRST SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

10. The Amended Complaint fails to state a claim against defendant KAL upon which relief can be granted.

AS AND FOR A SECOND SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

11. Plaintiff lacks the capacity to bring this action.

AS AND FOR A THIRD SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

12. The Amended Complaint should be dismissed pursuant to Rules 12(b)(7) and 19(a) of the Federal Rules of Civil Procedure for failure to join a necessary party plaintiff.

AS AND FOR A FOURTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

13. The Amended Complaint should be dismissed pursuant to Rule 12(b) (3) of the Federal Rules of Civil Procedure and Section 1391 of Title 28 of the United States Code for lack of proper venue.

AS AND FOR A FIFTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

14. The Amended Complaint should be dismissed pursuant to the doctrine of forum non conveniens.

AS AND FOR A SIXTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

15. The liability of defendant KAL, if any, with respect to the death of the plaintiff's decedent is limited in accordance with the provisions of the Warsaw Convention, defendant KAL's conditions of carriage and tariffs, and defendant KAL's counterpart to CAB Agreement No. 18900, to an aggregate sum not in excess of $75,000.

AS AND FOR A SEVENTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

16. This Court lacks subject matter jurisdiction over this action as none of the four places specified in Article 28(1) of the Warsaw Convention, where this action must be brought, is in the United States.

AS AND FOR AN EIGHTH SEPARATE
AND COMPLETE AFFIRMATIVE DEFENSE

17. Pursuant to Article 20 of the Warsaw Convention, defendant KAL is not liable to the plaintiff herein because KAL, through its officers, agents and employees, took all necessary measures to avoid the damage allegedly sustained by plaintiff herein or because it was impossible for KAL, through its officers, agents and employees to take such measures.

NOTICE OF APPLICABILITY OF FOREIGN LAW

Pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, defendant KAL hereby gives notice that it intends to raise issues concerning the law of a foreign country in this matter.

WHEREFORE, defendant KOREAN AIR LINES CO., LTD. demands judgment dismissing the Amended Complaint, with costs and disbursements, or if such relief not

be granted, that defendant KOREAN AIR LINES CO., LTD.'s liability be limited as prayed herein.

Dated: Washington, D.C.
October 16, 1985

CONDON & FORSYTH
1100 Fifteenth Street, N.W.
Washington, D.C. 20005.
(202) 289-0500

/s/ By George N. Tompkins, Jr.
George N. Tompkins, Jr.
Attorneys for Defendant
KOREAN AIR LINES
CO., LTD.

TO: Speiser, Krause & Madole
1216 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for Plaintiffs

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Washington, D.C. 20004

Jan Von Flatern, Esq.
Torts Branch, Civil Division
U.S. Department of Justice
P.O. Box 14271
Washington, D.C. 20044-4271

Attorneys for the United
States of America

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing ANSWER TO SECOND AMENDED COMPLAINT was this day served by first class mail upon the following:

Juanita Madole, Esq.
Speiser, Krause & Madole
1216 Sixteenth Street, N.W.
Washington, D.C. 20036

Attorneys for PLAINTIFF

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Washington, D.C. 20044

Mark A. Dombroff
Hughes, Hubbard & Reed
1201 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Attorneys for DEFENDANT
U.S.A.

Dated: October 16, 1985 /s/ Patricia A. Donnelly

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MDL Docket No. 565

CIVIL ACTION NOS.
83-2793, 83-2940, 83-2941, 83-3177, 83-3154, 83-3204, 83-3289, 83-3587, 83-3792, 83-3793, 83-3889, 83-3890, 84-0331, 84-0332, 84-0542, 84-1358, 84-1707, 84-1708, 84-1710, 84-2646, 84-2672, 84-2858, 84-2788,

Filed April 8, 1993

IN RE KOREAN AIR LINES DISASTER
OF SEPTEMBER 1, 1993,

MEMORANDUM OPINION

Before the Court are several pretrial motions filed by the defendant and plaintiffs in these case [sic]. They include: (1) KAL's motion requesting that Plaintiffs' damages be limited to those recoverable under the Death On the High Seas Act ("DOSHA"); (2) KAL's motion for partial summary judgment for decedents' Pre-death Pain and Suffering Claims; (3) KAL's Motion in Limine to Exclude the testimony of Experts on Pre-death Pain and Suffering; (4) KAL's Motion in Limine to Exclude any and all reference and evidence of KAL's negligence and wrongful misconduct; and (5) Plaintiffs' Motion for Prejudgment Interest.

A. Applicable Law

Defendant argues that the determination of damages in these cases should be governed exclusively by the Death on the High Seas Act (DOSHA), 46 U.S.C. § 761 *et seq.* Plaintiffs contend that since these claims are brought pursuant to the Warsaw Convention, DOSHA cannot limit the damages recoverable. This Court agrees.

As this Court stated previously, DOSHA is not the exclusive remedy in these cases. The Court has jurisdiction based concurrently on 28 U.S.C. § 1331 (Federal Question, i.e. the Warsaw Convention) and on DOSHA. To hold that the conflicting portions of DOSHA supersede those of the Convention would "render the Convention meaningless insofar as it relates to aircraft accidents which occur on the high seas more that a marine league from the shore." *See* In re Korean Air Lines Disaster of September 1, 1993 (March ___, 1992) slip. op at 7.

The Warsaw Convention allows for the recovery of all "damages sustained" and does not limit who may bring the suit as long as they can prove the loss. The Court of Appeals for the District of Columbia has held that "damages sustained" refers to actual harm experienced. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1485 (D.D.C. 1991). To the extent that this is contrary to the provision of DOSHA, the Warsaw Convention shall prevail. Accordingly, defendant's Motion is DENIED.

B. Motions Concerning Pre-death Pain and Suffering

Defendant moves for partial summary judgment of decedents' pre-death pain and suffering claims and requests that the court exclude the experts who will testify about the claims. KAL argues that the claim and all testimony in support of the claim is based on speculation and conjecture. Plaintiffs argue that there is sufficient evidence to produce a material question of fact that makes summary judgment inappropriate. Further, they contend that the experts' opinions are based on provable facts and will assist there [sic] trier of fact in understanding the evidence or determining a fact in issue.

The Court concludes that summary judgment is not appropriate in this instance. A question of fact exists as to what took place on board the plane after the missile strike. The resolution of this matter is material to the pre-death pain and suffering claims. Therefore, the motion for partial summary judgment is DENIED. The admission of the expert testimony is an evidentiary matter that can only be properly determined during the course of the trial. To the extend [sic] that Plaintiffs can provide the evidence necessary to sustain these claims, it will be heard by the jury.

C. Reference to KAL's "Willful Misconduct"

Plaintiffs will not be allowed to make mention of KAL's negligence or "willful misconduct" during voir dire or the presentation of evidence in this case. The liability of the defendant is not at issue in these proceedings and any mention of the jury's findings would be

unduly prejudicial to the defendant. However, the jury must be told how the litigation got to this point. Therefore, the parties are to stipulate to a statement concerning the events that led to the crash that may be used in the openings and closings in these cases. This statement should be submitted to the Court no later than the close of business on April 19, 1993.

D. Prejudgment Interest

Plaintiffs request that the Court award them prejudgment interest at the prime rate from the date of the incident. The defendant argues that Plaintiffs are not entitled to such interest due to their vigorous pursuit of punitive damages. KAL contends that if the Court determines that prejudgment interest is appropriate, it should be award [sic] from the date the Supreme Court denied certiorari and at the 52-week Treasury Bill rate.

The Court finds no merit in KAL's argument to preclude the awarding of prejudgment interest. Accordingly, Plaintiffs will receive prejudgment interest on their damage awards. However, a Determination of the rate of interest will be made at a later date.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

DATE: April 8, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

IN RE KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1993	:	MDL DOCKET NO. 565
	:	
	:	CIVIL ACTION NOS.
	:	83-2793
	:	83-2940
	:	83-2941
	:	83-3177
	:	83-3154
	:	83-3204
	:	83-3289
	:	83-3587
	:	83-3792
	:	83-3793
	:	83-3889
	:	83-3890
	:	84-0331
	:	84-0332
	:	84-0542
	:	84-1358
	:	84-1707
	:	84-1708
	:	84-1710
	:	84-2646
	:	84-2672
	:	84-2858
	:	85-2788

ORDER

(Filed Apr. 9, 1993)

Upon consideration of Defendant's Motion for Partial Summary Judgment, Motion in Limine to Preclude Expert Testimony on Pre-death Pain and Suffering, Motion in Limine to Exclude Reference to and Evidence of KAL's negligence and Wrongful Misconduct, and Motion

Regarding the Applicable Law, as well as plaintiffs' Motion for Prejudgment Interest; Plaintiffs' and Defendant's Oppositions thereto, and the Replies of both parties and the entire record in this case, and for the reasons stated in the accompanying Memorandum Opinion, it is by the Court this 8th day of April, 1993.

ORDERED, that KAL's Motion for Partial Summary Judgment, Motion in Limine to Preclude Expert Testimony on Pre-death Pain and Suffering, and Motion Regarding the Applicable-Law are DENIED; and it is

FURTHER ORDERED, that KAL's Motion in Limine to Exclude Reference to and Evidence of KAL's Negligence and Willful Misconduct is **GRANTED**; and it is

FURTHER ORDERED, that Plaintiffs' Motion for Prejudgment Interest is **GRANTED**, with the rate of interest to be determined at a later date.

/s/ Aubrey E. Robinson, Jr.
Aubrey E. Robinson, Jr.
United States
District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF COLUMBIA

CARL M. COLE, Administrator of the Estate of WOON KWANG SIOW, Deceased, Public Administrator, Surrogate Court, Plaintiff, v. KOREAN AIR LINES CO., LTD., Defendant.	MDL Docket No. 565 Civil Action No. 84-1710 Judge Aubrey E. Robinson, Jr.

THIRD AMENDED COMPLAINT

COMES NOW Plaintiff, CARL M. COLE, Administrator of the Estate of WOON KWANG SIOW, deceased, by and through his attorneys, SPEISER, KRAUSE, MADOLE & LEAR, and sues the Defendant, KOREAN AIR LINES CO., LTD. alleging upon information and belief as follows:

1. Plaintiff, CARL M. COLE, is a citizen and resident of the State of New York. Plaintiff, CARL M. COLE, was appointed Successor Administrator of the estate of WOON KWANG SIOW, deceased, by Order of Substitution of the Surrogates Court of Erie County, New York on October 2, 1991.

2. The Defendant KOREAN AIR LINES CO., LTD. is a foreign corporation, incorporated in, and having its principal place of business in a state other than the District of Columbia. KOREAN AIR LINES CO., LTD. is

authorized to do, and is doing, business in the District of Columbia.

3. At all times relevant hereto, there is complete diversity of citizenship between the plaintiffs and the Defendant KOREAN AIR LINES CO., LTD. and the matter in controversy exceeds the sum of Ten Thousand ($10,000.00) exclusive of interests and costs.

4. The crash and resulting death which are the basis for this Complaint occurred on the high seas more than a marine league from the shore of any state, the District of Columbia or any territory of the United States.

5. This Court has jurisdiction of this suit against the Defendant KOREAN AIR LINES CO., LTD. based upon 28 U.S.C. § 1331, pursuant to the Warsaw Convention,[1] a treaty of the United States; 28 U.S.C. § 1332 and § 1333; and/or 46 U.S.C. § 761-767.

FIRST CAUSE OF ACTION AGAINST DEFENDANT KOREAN AIR LINES CO. LTD. FOR WRONGFUL DEATH

6. At all times relevant hereto, the Defendant KOREAN AIR LINES CO., LTD. was and is a common carrier in foreign air transportation engaged in the business of transporting persons and property for compensation and hire pursuant to a Foreign Air Carrier permit issued by the United States of America.

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[1] Convention for Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 stat. 3000, T.S. No. 876, 137 L.N.T.S. 11, *Reprinted in* 49 U.S.C. App. § 1502 note (1982)

7. On August 31, 1983, the Defendant KOREAN AIR LINES CO., LTD. owned, operated, maintained and controlled a certain Boeing 747-200 jet aircraft which was being operated as KAL Flight 007, and was the employer of the captain and crew.

8. Prior to the departure of KAL Flight 007 from JFK International Airport on August 31, 1983, decedent WOON KWANG SIOW was ticketed and had a contract of carriage entered into the United States for KAL Flight 007 which was scheduled to depart from JFK International Airport enroute to Seoul, South Korea.

9. On August 31, 1981 [sic], through September 1, 1983, at all times relevant hereto, decedent WOON KWANG SIOW was a passenger for compensation and hire on KAL Flight 007.

10. On August 31, 1983, through September 1, 1983, at all times relevant hereto, Defendant KOREAN AIR LINES CO., LTD. operated, conducted and dispatched Flight 007 from its departure from JFK International Airport to its intermediate stopover at Anchorage, Alaska and, thereafter, from its departure from Anchorage on its enroute flight to Seoul, South Korea.

11. At all times relevant hereto, Defendant KOREAN AIR LINES CO., LTD. trained, educated and employed the Captain of Flight 007, Chun Byung In; the First Officer of Flight 007, Dong Hui Sohn; and the Flight Engineer of Flight 007, Eui Dong Kim. At all times relevant hereto, the forenamed employees of Defendant KOREAN AIR LINES CO., LTD. were acting within the course and scope of their employment with Defendant KOREAN AIR LINES CO., LTD.

12. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, KOREAN AIR LINES CO., LTD. Flight 007 deviated from its assigned international route of flight, R20, which it was required to follow after departure from Anchorage, Alaska while enroute to Seoul, South Korea. Flight 007's failure to follow its assigned flight path resulted in its passage over the Kamchatka Peninsula, the Sea of Okhotsk, Sakhalin Island and the Sea of Japan.

13. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics (U.S.S.R.) controlled the airspace over the Kamchatka Peninsula, the Sea of Okhotsk and Sakhalin Island and published warnings that aircraft flying in that airspace may be fired upon without warning.

14. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, the Union of Soviet Socialist Republics dispatched certain jet fighters to intercept KAL Flight 007.

15. On August 31, 1983, through September 1, 1983, and at all times relevant hereto, KOREAN AIR LINES CO., LTD. Flight 007 was struck by one or more missiles fired by U.S.S.R. interceptor aircraft which caused Flight 007 to crash into the Sea of Japan, resulting in the conscious mental and physical pain, suffering and anguish, and subsequent death, of WOON KWANG SIOW.

16. Pursuant to the ticket purchased from Defendant KOREAN AIR LINES CO., LTD. and as an air carrier in its status as of August 31, through September 1, 1983, the Defendant agreed, and had a duty, to exercise the highest degree of care in transporting the decedent to his

destination. The Defendant failed to exercise the required degree of care in transporting the decedent, wilfully and wantonly performed hazardous operational acts with the knowledge that said acts were likely to result in injury to the passengers, wilfully performed hazardous operational acts with reckless and wanton disregard for the probable consequences that injury would result to the passengers, and intentionally violated known requirements and standards of care with knowledge that such violations could cause injury to the passengers in the following respects:

(a) by carelessly and wrongfully operating, and/or controlling said aircraft with respect to its piloting, navigating and following international procedures, and/or

(b) by failing to take the reasonable and safe precautions to see that the aircraft was not flown in hazardous airspace, thereby creating a danger and hazard to the passengers in the aircraft when the Defendant knew, or in the exercise of reasonable care should have known, that such dangers and hazards were present at the place where the aircraft was shot down, and/or

(c) by failing to take reasonable and safe precautions to see that the aircraft was properly and safely operated on its approved and assigned course of flight, thereby creating a danger and a hazard to the passengers in the aircraft when the Defendant knew, or in the exercise of reasonable care should have known, that the dangers and hazards of flight in U.S.S.R. territory existed, and/or

(d) by failing to train and supervise its agents, servants and employees in the reasonable and proper

methods of operating, piloting, navigating and controlling the aircraft in general, as to piloting procedures in general and/or as to piloting procedures in operation near U.S.S.R. territory, and/or

(e) by failing to take reasonable and safe precautions to see that the aircraft was in a safe and proper condition to be flown as a common carrier in foreign air transportation when the Defendant knew, or in the exercise of reasonable care should have known, that a danger and hazard to the passengers in the aircraft would be created if the aircraft was not in a reasonably safe and proper condition and/or if it were operated in, over or near U.S.S.R. territory, and/or

(f) by failing to properly and safely operate and/or observe the cockpit instruments in the aircraft in question, including, but not limited to, the internal navigation units, the weather radar units, and the radio navigation devices, and/or

(g) by failing to properly instruct and train the employees of the Defendant, including the crew in question, as to how to properly and safely operate and/or observe and understand the cockpit instruments including, but not limited to, the inertial navigation units, the radar units and the radio navigation units, and the aircraft, and/or

(h) by operating the aircraft into dangerous, hazardous and unsafe conditions, in violation of all reasonable safety regulations, procedures and standards.

17. As a direct and proximate result of the negligent, wrongful and wilful misconduct of the Defendant

and its wanton disregard for the safety of the passengers, the decedent WOON KWANG SIOW was killed. The Personal Representative of his estate is entitled to recover damages for the wrongful death of the decedent.

WHEREFORE, for the foregoing reasons, plaintiff has been damaged in the amount of TEN MILLION DOLLARS ($10,000,000.00), and demands same from the Defendant, together with costs and interest.

SECOND CAUSE OF ACTION AGAINST DEFENDANT KOREAN AIR LINES CO., LTD.

18. Plaintiffs repeat, reassert and reallege each and every allegation contained in paragraphs 1 through 17, inclusive, as if fully set forth herein.

19. As a direct and proximate result of the negligent, wrongful and wilful misconduct of the Defendant and its wanton disregard for the safety of the passengers, WOON KWANG SIOW was caused to suffer serious and grievous conscious mental and physical pain and suffering and fear of impending death, for which the plaintiff Personal Representative of his estate is entitled to recover damages herein.

WHEREFORE, for the foregoing reasons, the plaintiff Personal Representative of the Estate of WOON KWANG SIOW, deceased, has been damaged in the amount of $2,000,000.00 and demands same from the Defendant, together with costs and interests.

FOR THE FOREGOING REASONS, the plaintiff Personal Representative of the Estate of WOON KWANG SIOW, deceased, demands judgment of the Defendant for

damages of TEN MILLION DOLLARS ($10,000,000.00) for wrongful death and TWO MILLION DOLLARS ($2,000,000.00) for decedent's conscious physical and mental pain and suffering, under applicable Survival Statutes and pursuant to the Warsaw Convention, together with costs and interest and demands a trial by jury of all issues triable as of right by jury herein.

DATE: September 12, 1994

Respectfully submitted,
SPEISER, KRAUSE, MADOLE
& LEAR
1300 North 17th Street
Suite 310
Rosslyn, Virginia 22209
(703) 522-7500

By /s/ Juanita M. Madole
JUANITA M. MADOLE
D.C. Bar No. 218396
Attorneys for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on Sept. 12, 1994, a copy of the foregoing Third Amended Complaint was sent, via first class mail, postage prepaid, to:

George N. Tompkins, III Esq.
Tompkins, Harakas, Elsasser & Tompkins
Westchester Financial Center
50 Main Street
White Plains, New York 10606

/s/ Karen E. Blacker
Karen E. Blacker,
Legal Assistant to
JUANITA M. MADOLE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CARL M. COLE, Administrator of the Estate of WOON KWANG SIOW, Deceased, Public Administrator, Surrogate Court, Plaintiff, v. KOREAN AIR LINES, CO., LTD., Defendant.	Civil Action No. 84-1710 (AER)

ANSWER TO THIRD AMENDED COMPLAINT

Defendant Korean Air Lines Co., Ltd., ("KAL") by and through its undersigned counsel, Tompkins, Harakas, Elsasser & Tompkins and Condon & Forsyth, hereby Answers Plaintiff's Third Amended Complaint ("Third Amended Complaint") as follows:

1. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 1 of the Third Amended Complaint.

2. Denies the allegations in Paragraph 2 of the Third Amended Complaint, except that defendant KAL admits that it is a foreign corporation duly organized and existing under the laws of the Republic of South Korea which does business in the District of Columbia.

3. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraph 3 of the Third Amended Complaint.

4. Admits the allegations contained in Paragraph 4 of the Third Amended Complaint.

5. Admits the allegations in Paragraph 5 of the Third Amended Complaint.

FIRST CAUSE OF ACTION

6. Admits the allegations in Paragraph 6 of the Third Amended Complaint.

7. Denies the allegations in Paragraphs 7, 10, 11 and 12 of the Third Amended Complaint, except that KAL admits that on September 1, 1983, defendant KAL owned and operated a certain Boeing 747 model aircraft which was being operated as its regularly scheduled Flight KE007 from New York, New York, U.S.A. to Seoul, South Korea, when it was shot down by Soviet military aircraft and further admits that the flight crew of said flight were employees of defendant KAL.

8. Denies knowledge or information sufficient to form a belief as to the truth of the allegations in Paragraphs 8, 13 and 14 of the Third Amended Complaint.

9. Denies the allegations in Paragraphs 9, 15, 16(a)-(h) and 17 of the Third Amended Complaint

SECOND CAUSE OF ACTION

10. Answering Paragraph 18 of the Third Amended Complaint, defendant KAL repeats, reiterates and realleges each and every answer to the allegations in paragraphs 1 through 17 of the Third Amended Complaint with the same force and effect as if herein set forth in full.

11. Denies the allegations in Paragraph 19 of the Third Amended Complaint.

AS AND FOR A FIRST AFFIRMATIVE DEFENSE

12. The Third Amended Complaint fails to state a claim against defendant KAL upon which relief can be granted.

AS AND FOR A SECOND AFFIRMATIVE DEFENSE

13. Plaintiff lacks the capacity to bring this action.

AS AND FOR A THIRD AFFIRMATIVE DEFENSE

14. The Third Amended Complaint should be dismissed pursuant to Rules 12(b)(7) and 19(a) of the Federal Rules of Civil Procedure for failure to join a necessary party plaintiff.

AS AND FOR A FOURTH AFFIRMATIVE DEFENSE

15. The Third Amended Complaint should be dismissed pursuant to the doctrine of *forum non conveniens*.

AS AND FOR A FIFTH AFFIRMATIVE DEFENSE

16. The liability of defendant KAL, if any, with respect to the death of the plaintiff's decedent is limited

in accordance with the provisions of the Warsaw Convention, defendant KAL's conditions of carriage and tariffs, and defendant KAL's counterpart to CAB Agreement No. 18900, to an aggregate sum not in excess of $75,000.

NOTICE OF APPLICABILITY OF FOREIGN LAW

17. Pursuant to Rule 44.1 of the Federal Rules of Civil Procedure, defendant KAL hereby gives notice that it intends to raise issues concerning the law of a foreign county in this matter.

WHEREFORE, defendant KOREAN AIR LINES CO., LTD. demands judgment dismissing the Third Amended Complaint together with costs, disbursements and such other and further relief as this Court deems proper in the circumstances.

Dated: December 8, 1994

CONDON & FORSYTH

BY: /s/ Timothy J. Lynes
D.C. Bar # 390281

1100 Fifteenth St., N.W.
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Attorneys for Defendant
KOREAN AIR LINES CO., LTD.

To: Juanita M. Madole, Esq.
Speiser, Krause, Madole & Lear
1300 North Seventeenth Street
Suite 310
Rossyln, Virginia 22209-3800
(703) 522-7500

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Answer to Third Amended Complaint was served by First Class Mail this 8th day of December, 1994 upon:

Juanita M. Madole, Esq.
Speiser, Krause, Madole & Lear
1300 North Seventeenth Street
Suite 310
Rosslyn, Virginia 22209-3800

Attorneys for Plaintiff

/s/ Andrew J. Harakas
Andrew J. Harakas

UNITED STATES DISTRICT COURT
For the District of Columbia

MDL Docket No. 565
Misc. No. 83-0345

83-2793 Dooley
83-2940 Saavedra
84-0331 Boyar
84-0332 Boyar
84-1710 Cunningham

Filed June 4, 1996

In re Korean Air Lines Disaster
of September 1, 1983,

MEMORANDUM OPINION AND ORDER

On September 1, 1983, Korean Air Lines ("KAL") flight KE007 was shot down by a Soviet military aircraft, after it had veered off its course into Soviet airspace, killing all 269 passengers. The liability of KAL for those deaths was determined in a multidistrict litigation action in the District Court for the District of Columbia.[1] In that action, a jury found that KAL's "willful misconduct" proximately caused the passengers deaths, thus allowing recovery beyond the Warsaw Convention's $75,000 cap on damages. *See* Warsaw Convention, Art. 25, 49 Stat. 3020; Order of Civil Aeronautics Board Approving Increases in Liability Limitations of Warsaw Convention

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[1] An extensive discussion of the facts of this case may be found in *In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475 (D.C. Cir.), *cert. denied*, 502 U.S. 994 (1991).

and Hague Protocol, *reprinted in note following* 49 U.S.C. App. § 1502 (1988 ed.). Following appeals of this action, the individual compensatory damages trials were remanded by the Judicial Panel on Multidistrict Litigation to the original transferor courts. Several actions regarding the recoverable compensatory damages still remain before this Court.

Presently before the Court is Defendant KAL's Motion to Dismiss Claims for Nonpecuniary Damages. Defendant argues that damages for loss of society, survivor's mental grief, and for predeath pain and suffering of a decedent are not recoverable. The parties agree that Plaintiffs' claims for loss of society damages must be eliminated in light of *Zicherman v. Korean Air Lines Co., Ltd.*, ___ U.S. ___, 116 S. Ct. 629 (1996). KAL's Motion raises two issues: (1) Whether claims for mental grief, recoverable under Korean law, may be pursued in this Court after a choice of law analysis, and (2) whether survival damages for pre-death pain and suffering may supplement the wrongful death damages available under the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.*

I. Discussion

Article 17 of the Warsaw Convention makes a airline liable for "damages sustained" in the event of the death of a passenger, it provides:

> The carrier shall be liable for *damages sustained* in the event of the death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the

> damage so sustained took place on board the aircraft or in the course of any of the operations of embarking or disembarking.

49 Stat. 301 (emphasis added).

Until the Supreme Court's decision in *Zicherman*, ___ U.S. ___, 116 S. Ct. at 629, various courts struggled with the question of which "damages" are available under the Warsaw Convention. *See, e.g., In re Korean Air Lines*, 932 F.2d. at 1475 (D.C. Cir. 1991); *In re Air Disaster at Lockerbie, Scotland*, 928 F.2d 1267 (2nd Cir.), *cert. denied, sub nom. Rein v. Pan American World Airways, Inc.*, 502 U.S. 920 (1991). With *Zicherman* the Court put some of this confusion to rest, holding that "damage" means only "legally cognizable harm" and that "Article 17 leaves it to the adjudicating courts to specify what harm is cognizable." 116 S. Ct. at 633. The Court found support for its interpretation of "damage" in Article 17 through the express limitations of Article 24 of the Warsaw Convention which provides:

> (1) In the cases covered by articles 18 and 19 any action for damages, however founded, can only be brought subject to the conditions and limits set out in this convention.
>
> (2) In the cases covered by article 17 the provisions of the preceding paragraph shall also apply, *without prejudice to the question as to who are the persons who have the right to bring suit and what are their respective rights.*

49 Stat. 3020 (emphasis added). Under the Court's interpretation of Article 24(2) when an "action is brought under Article 17, the law of the Convention does not affect the substantive questions of who may bring suit

and what they may be compensated for." *Zicherman*, 116 S. Ct. at 634. The Court concluded that "Articles 17 and 24(2) of the Warsaw Convention permit compensation only for legally cognizable harm, but leave the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice of law rules." *Id.* at 637.

A. Choice of Law

Having concluded that compensable harm is determined by domestic law, the *Zicherman* Court explained that its next logical step would be to determine which sovereign's domestic law applied. The Court did not conduct a choice of law analysis because the parties had previously agreed that the issue of compensable harm was governed by United States law. The Court held, however, that where United States law governed, the Death on the High Seas Act ("DOHSA"), 46 U.S.C. App. § 761 *et seq.* (1988), supplied the substantive law of damages for an aircraft crash on the high sea. *Id.* at 636.

This Court has not been spared the choice of law question regarding which sovereign's domestic law governs compensable harm. Jurisdiction in these actions is premised on the federal treaty, the Warsaw Convention, 28 U.S.C. § 1331, admiralty, 28 U.S.C. § 1333, and in part on diversity. Here the parties are diverse because the Plaintiffs are citizens of the United States and the Defendant is a foreign nation. In *Klaxon Co. v. Stentor Electric Manufacturing Co., Inc.*, 313 U.S. 487, 496 (1941), the Court held that a federal court sitting in diversity must apply the choice of law principles of the state in which it sits.

Because jurisdiction in these cases is based only partly on diversity, application of the District of Columbia's choice of law rules is not necessarily required, especially in light of a potential conflict between the District of Columbia and a federal policy. In *O'Melveny & Meyers v. F.D.I.D.*, ___ U.S. ___, 114 S. Ct. 2048, 2055 (1994), the Court explained that a special federal rule is justified in "limited situations where there is a 'significant conflict between some federal policy or interest and the use of state law.' "

The Court recognizes that there is "no federal general common law," *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938), but is guided by the Court of Appeals for the Sixth Circuit's determination that the Warsaw Convention's, "concrete federal policy of uniformity and certainty" would be undermined if a state choice of law rule is applied, and therefore a special federal rule is appropriate to govern this choice of law question. *Bickel v. Bowden*, ___ F.3d ___, 1996 WL 203349 at *3 (6th Cir. 1996). In discussing the important federal policy of uniformity and certainty embodied by the Warsaw Convention, the Court of Appeals for the Second Circuit explained:

> The principal purposes that brought the Convention into being and presumably caused the United States to adhere to it were a desire for uniformity in the laws governing carrier liability and a need for certainty in the application of those laws. . . . Hence, the test to be applied is whether these goals of uniformity and certainty are frustrated by the availability of state causes of action for death and injuries suffered by passengers on international flights. We do not see

how the existence of state law causes of action could fail to frustrate these purposes.

In re Air disaster at Lockerbie, Scotland, 928 F.2d. 1267, 1275 (2nd Cir. 1991). Application of the United States' various choice of law rules could have a deleterious effect on consistent determinations of the applicable rules regarding damages under the Warsaw Convention. Thus, this Court is convinced that a federal choice of law rule is necessary here.

In the absence of any established body of federal choice of law rules, courts have looked to the Restatement (Second) of Conflict of Laws (1969) (hereinafter "Restatements") as "a source of general choice of law principles and an appropriate starting point for applying federal common law in this area." *See Bickel*, at *3; *Harris v. Polskie Line Lotnicze*, 820 F.2d. 1000, 1003 (9th Cir. 1987). Section 175 of the Restatements provides a choice of law rule (known as the *lex loci delicti* rule) for a wrongful death action and creates a presumption in favor of law of the location where the injury occurred:

> In an action for wrongful death, the local law of the state where the injury occurred determines the rights and liabilities of the parties unless, with respect to the particular issue, some other state has a more significant relationship under the principles stated in § 6 to the occurrence and the parties, in which event the local law of the other state will be applied.

Restatements, § 175. The *lex loci delicti* rule in § 175 is difficult to apply in these cases because " it is not clear whether KE007 was shot down in Soviet airspace, over Japanese territory or in international waters." *In re Korean*

Air Lines, 932 F.2d at 1497 (Mikva, J. dissenting). Additionally, the Sixth Circuit recognized that assuming that the former U.S.S.R. was the place the injury occurred, "the U.S.S.R. is ceased to exist . . . [and therefore] no longer has a judicially cognizable interest in these matters." Furthermore, the parties have limited their choice of law arguments to whether the United States or the law of Korea applies, and the Court finds that these countries should be the focus of the choice of law determination.

"In lieu of the *lex loci* rule, § 6 of the Restatements endorses a "most significant relationship" or "center of gravity" test, which requires considerations of several factors to determine which state has a more significant interest in having their law applied. "The governmental interest approach seeks to identify which jurisdictions may have an actual interest in having their substantive law apply to a particular controversy. . . . " *See In re Korean Air Lines*, 932 F.2d at 1497 (Mikva, J. dissenting). The relevant factors of § 6 include:

> (a) the needs of the interstate and international systems; (b) the relevant policies of the forum; (c) the relevant policies of other interested states and the relative interest of those states in the determination of the particular issue: (d) the protection of justified expectations; (e) the basic policies underlying the particular field of law; (f) certainty, predictability, and uniformity of result; and (g) ease in the determination and application of the law to be applied.

When considering the contacts of the two countries the Court notes that South Korea is KAL's place of incorporation, its principal place of business, and the place where

its crews are trained. On the other hand, the United States is the place of embarkation for many of the passengers, where the flight originated, and where all of the tickets were purchased.

Though both the United States and South Korea have significant contacts, consideration of the factors in § 6 convinces this Court that the United States law should govern these cases. The Court agrees with the analysis of the Sixth Circuit that "application of United States law supports 'ease in the determination and application of the law applied' " and " 'the relevant policies of other interested states and the relative interests of those states in the determination of the particular issue.' " weigh heavily in the favor of this United States." *Bickel*, at *4. Indeed, "certainty, predictability, and uniformity of result" would be supported because the Supreme Court has already applied the United States law when determining compensatory damages. *See Zicherman*, 116 S. Ct. at 629; *In re Korean Air*, 932 F.2d at 1475.

Furthermore, this Court agrees that because "these actions arise under the Warsaw Convention, neither nation can legitimately claim to offer greater protection of the 'the basic policies underlying the particular field of law,' or 'the needs of the interstate and international system.' " *Bickel*, at *4. Accordingly, the Court finds that the United States law is the most appropriate when determining the available compensatory damages for these actions.

B. Loss of Society and Survivor's Grief

In light of the Supreme Court's decision in *Zicherman*, that DOHSA, supplies the substantive United States law regarding damages and that loss of society damages are not available under DOHSA this Court concludes that survivor's grief damages are also unavailable.[2] The

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[2] Because the Court has determined that United States law governs the damages issues in this action and that DOHSA applies, Plaintiffs' argument that mental grief damages are available because Korean law permits claims for such damages is irrelevant.

Additionally, the Court rejects Plaintiffs' assertion that sections 1 and 4 of DOHSA are cumulative. 46 U.S.C. App. §§ 761, 764. Following Plaintiffs' interpretation of DOHSA, they are entitled to recover all pecuniary damages allowed by virtue of § 1 of DOHSA and in addition any damages allowed by Korean law pursuant to § 4. The Court finds that sections 1 and 4 are mutually exclusive rather than cumulative. *See In re Air Crash Near Bombay, India on Jan. 1, 1978*, 531 F. Supp. 1175 (W.D. Wash. 1982); *Bergeron v. Koninklijke Luchtvaart Maatschappij N.V.*, 188 F. Supp. 594 (S.D.N.Y. 1960). Section 1 of DOHSA provides:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Colombia [sic], or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensured.

Zicherman Court held that under § 762 of DOHSA recovery in a suit for death under § 761 "shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefits the suit is brought." 46 U.S.C. App. § 762. Following the dictates of DOHSA, the Court concluded that loss-of-society damages, since they are not pecuniary, may not be recovered.

Damages for a survivor's grief are a non-pecuniary form of damages which represents compensation for an emotional response to wrongful death. *Sea-Land Serv., Inc. v. Gaudet*, 414 U.S. 573, 585 n.17 (1974). The Supreme Court has previously recognized that although federal maritime law permits dependent survivors to recover loss of society damages, it precludes survivors from recovering additional damages for their grief or mental injury. *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 622 (1978). Having concluded in *Zicherman* that DOHSA precludes recovery for the nonpecuniary damages such as loss of society, survivor's grief should be similarly unavailable. The court agrees with the Sixth Circuit that there is no

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46 U.S.C. App. § 761. Section 4 provides:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States. . . .

42 U.S.C. App. § 764. The Court finds that while § 4 permits a cause of action based upon foreign law to be brought in admiralty in federal court, it only applies when foreign law applies pursuant to a choice of law analysis. In this case, it has been determined that United States law governs therefore the Court finds that § 4 is inapplicable and that only § 1 governs damages.

"distinction of which the *Zicherman* Court would have approved that would permit us to conclude that the recovery of one sort of non-pecuniary damages, such as loss of society, is precluded by DOHSA, whereas other sorts of non-pecuniary damages, such as survivor's grief, are not." *Bickel*, at *5.

C. Survival Actions for Pre-Death Pain and Suffering

Plaintiffs also argue that DOHSA limits recovery for only wrongful death claims and does not preclude additional recovery for pre-death pain and suffering because it is a survival claim.[3] There is no dispute that recovery for the decedents' alleged pre-death pain and suffering is not recoverable under DOHSA.[4] Rather, Plaintiffs argue that their survival claims are distinct from wrongful death claims and are available under general maritime law and can supplement the damages recoverable under DOHSA.

This Court disagrees. Although, other courts have allowed a pain and suffering claim to supplement the

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[3] "A wrongful death cause of action belongs to the decedent's dependents. . . . A survival action, in contrast, belongs to the estate of the deceased (although it is usually brought by the deceased's relatives acting in a representative capacity) and allows recovery for the injury to the deceased from the action causing death." *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622 (3d Cir. 1994); *aff'd* ___ U.S. ___, 116 S. Ct. 601 (1996).

[4] DOHSA is a wrongful death statute that restricts recoverable to the "pecuniary loss sustained." 46 U.S.C. App. § 762.

awards recoverable under DOHSA, it appears to this Court that with *Zicherman*, the Supreme Court has held that DOHSA provides the exclusive remedy for damages which cannot be supplemented with general maritime principles.[5] The Court explained where DOHSA applies neither state law, nor general maritime law, can provide a basis for recovery of loss-of-society damages." *Zicherman*, 116 S. Ct. at 636 (citations omitted): *See also Higginbotham*, 436 U.S. at 618 (federal maritime law is not available to supplement DOHSA because with DOHSA Congress specifically spoke to the issue of damages and provided damages only for pecuniary losses, the Court may not provide supplementary damages beyond that authorized by Congress). Therefore, in light of the Supreme Court's decision in *Zicherman*, this Court finds that the non-pecuniary pain and suffering damages may not supplement the damages available under DOHSA.

II. Conclusion

For the foregoing reasons, it is by the Court this 4th day of June, 1996.

ORDERED, that Defendant's Motion to Dismiss All Claims for Non-Pecuniary Damages be and hereby is GRANTED: and it is

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[5] In cases decided prior to *Zicherman*, several courts used general maritime survival principles to supplement the pecuniary damages available under DOHSA, with pain and suffering damages. *See e.g., Barbe v. Drummond*, 507 F.2d 795, 800 (5th Cir. 1974); *McAleer v. Smith*, 791 F. Supp. 923, 926 (D.R.I. 1992).

FURTHER ORDERED, that Plaintiff's claims for loss of society damages, mental anguish and grief, and pre-death pain and suffering be and hereby are DISMISSED with prejudice.

/s/ AUBREY E. ROBINSON, JR.
Aubrey E. Robinson, Jr.
United States District Judge

ORDER upon consideration of the Joint Motion for an Order Amending Order of June 4, 1996 to Include Statutory Language From 28 U.S.C. 1292(b) to Certify the Court's Order of June 4, 1996 for an Interlocutory Appeal and a Joint Motion for a Stay, it is by the Court this 1st day of July, 1996.

ORDERED, that the above-captioned actions be and hereby are STAYED until further Order of the Court; and it is

FURTHER ORDERED, that the Joint Motion for certification of this Court's Order of June 4, 1996 to the Court of Appeal for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), be and hereby is GRANTED; and it is

FURTHER ORDERED, that this Court's Order of June 4, 1996 be and hereby is amended to state:

Certification for Interlocutory Appeal

Generally, appellate review of a trial court's decision is only appropriate upon an appeal from a final judgement in the trial court, that is, only after all the issues involved in a particular lawsuit have been finally determined. See F. James and G. Hazard, Civil Procedures § 12.4 at 657 (1985). However, in 1958 Congress created a statutory exception to the final judgment rule, codified at

28 U.S.C. § 1292(b). Section 1292(b) provides in pertinent part:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. . . .

Thus, an interlocutory appeal can be properly certified only where the district court and the appellate court agree that (1) an order involves a "controlling question of law"; (2) this controlling question of law is one upon which "there is substantial ground for difference of opinion"; and (3) "an immediate appeal from the order may materially advance the ultimate termination of the litigation."

The within action [sic] are governed by the Warsaw Convention, Convention for the Unification of Certain Rules Relating to International Transportation by Air, October 12, 1929, 49 Star. 3000, T.S. No. 876 (1934), reprinted in note following 49 U.S.C. § 1502. The liability of Korean air for the death of all passengers on Korean Air Lines Flight KE007 has previously been established. See In re Korean Air Lines Disaster of September 1, 1983, 932 F.2d 1475 (D.C. Cir.), cert. denied 502 U.S. 994 (1991). The actions remaining in this Court assert recovery for damages and are postured following the Supreme Court's decision in Zicherman v. Korean Air Lines Co., Ltd., ___

U.S. ___, 116 S.Ct. 629 (1996), which held that the wrongful death cause of action is covered by the Death on the High Seas Act, 46 U.S.C. App. § 764 et seq. ("DOHSA"). Specifically, Plaintiffs claim a right to recovery damages for mental anguish and grief pursuant to 28 U.S.C. § 764 under Korean law and that there is a general maritime survival action separate and distinct from the wrongful death action under DOHSA which may co-exist with the wrongful death action.

The Court has granted Korean Air Lines' Motion to Dismiss all claims for nonpecuniary damages holding that mental anguish and grief damages may not be recovered and that a general maritime survival action may not supplement wrongful death damages under DOHSA. The pending issues have never been addressed by the United States Court of Appeals for the District of Columbia and were not addressed in Zicherman, ___ U.S. ___, 116 S.Ct. at 629.

The parties are of the opinion that the recoverable damages issues involve controlling questions of law which are of significant importance to the remaining damages trials currently pending in this Court and that there are substantial grounds for differences of opinion. The parties are further of the opinion that an immediate appeal from this Order will materially advance the ultimate termination of the remaining litigation.

This Court agrees. During the many years that this litigation has been in this Court and in the other district courts and circuit courts across the United Stats questions regarding recoverable damages have repeatedly confounded the courts. Complicating the determination of

available damages are circuit splits and the interplay between the Warsaw Convention, DOHSA, and general maritime law. With the Supreme Court's opinion in Zicherman, a major step was taken towards resolving the difficult question of available damages under the Warsaw Convention Guidance from the Court of Appeals for the District of Columbia Circuit regarding: (1) the availability of mental anguish and grief damages; and (2) the availability a survival action for pain and suffering damages in light in Zicherman, will hopefully assist in terminating these action [sic] once in [sic] for all. Therefore the Court certifies this Order dismissing Plaintiffs' claims for non-pecuniary damages for an immediate interlocutory appeal.

It is FURTHER ORDERED, that above-captioned cases be and hereby are certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b) because they involve controlling questions of law as to which there is substantial ground for difference of opinion and an immediate appeal therefrom may materially advance the ultimate termination of this litigation.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

117 F.3d 1477 (D.C. Cir. 1997)

Argued May 6, 1997 Decided July 11, 1997

No. 96-5278

IN RE: KOREAN AIR LINES DISASTER OF SEPTEMBER 1, 1983
PHILOMENA DOOLEY, ET AL. V. KOREAN AIR LINES CO., LTD.

Appeal from the United States District Court
for the District of Columbia
(83ms00345)

Juanita M. Madole argued the cause and filed the briefs for appellants.

Andrew J. Harakas argued the cause for appellee. With him on the brief was *George N. Tompkins, Jr.*

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Before: WALD and RANDOLPH, *Circuit Judges*, and BUCKLEY, *Senior Circuit Judge*.

Opinion for the Court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: On September 1, 1983, while Korean Air Lines flight KE007 was en route from New York City to Seoul, South Korea, via Anchorage, Alaska, a Soviet military aircraft shot down the airliner over the Sea of Japan, killing all 269 people on board. We have recounted details of the tragedy elsewhere. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 932 F.2d 1475, 1476-79 (D.C. Cir. 1991).

In the ensuing litigation, a joint liability trial on the claims of 137 plaintiffs took place in the United States District Court for the District of Columbia. A jury found that Korean Air Lines had committed "willful misconduct," thus removing the Warsaw Convention's limitations on liability. This court affirmed. *Korean Air Lines Disaster*, 932 F.2d at 1479-84. (We did, however, vacate an award of punitive damages. *Id.* at 1484-90.) The actions were then remanded to the courts in which they had originated for individual proceedings on compensatory damages. This case comes to us as an interlocutory appeal, pursuant to 28 U.S.C. § 1292(b), in five damages actions that have not yet gone to trial.

Early in the damages phase of the litigation, the district court rejected Korean Air Lines's argument that the Death on the High Seas Act, 46 U.S.C. App. § 761 *et seq.*, restricted the damages plaintiffs could recover. As discussed later, the Act permits only certain surviving relatives to recover "pecuniary" losses. The district court

believed another law – Article 17 of the Warsaw Convention (*see* Convention for the Unification of Certain Rules Relating to International Transportation by Air, Oct. 12, 1929, art. 17, 49 Stat. 3000, 3018) – "allows for the recovery of all 'damages sustained,' " meaning any "actual harm" any party "experienced" as a result of the crash. Thereafter, the Supreme Court reached a different conclusion: the Warsaw Convention, rather than providing a measure of damages, "permit[s] compensation only for legally cognizable harm, but leave[s] the specification of what harm is legally cognizable to the domestic law applicable under the forum's choice-of-law rules." *Zicherman v. Korean Air Lines Co.*, 116 S. Ct. 629, 637 (1996).

After the *Zicherman* decision, Korean Air Lines moved in the district court to dismiss all claims for nonpecuniary damages, including damages for loss of society and mental grief, and damages for the decedents' predeath pain and suffering. Because *Zicherman* directed lower courts to look to some source of domestic law in a Warsaw Convention case, the district court began with a choice-of-law analysis and concluded that United States law governed these suits. *In re Korean Air Lines Disaster of Sept. 1, 1983*, 935 F. Supp. 10, 12-14 (D.D.C. 1996). No party has challenged that determination. The court then ruled that the Death on the High Seas Act provided the applicable U.S. law, *id.* at 14, and that the Act did not permit the recovery of nonpecuniary damages, *id.* at 14-15.

Plaintiffs detect two faults in the district court's reasoning. While they concede that the Death on the High Seas Act itself provides no right to recover damages for a decedent's pre-death pain and suffering, they believe the

"general maritime law" recognizes such a cause of action. They also interpret a provision of the Death on the High Seas Act as allowing them to proceed under South Korean law despite the district court's undisputed choice-of-law finding that U.S. law applies. The law of South Korea, they say, permits them to recover damages for pre-death pain and suffering and for the mental grief of surviving relatives.

I

The first section of the Death on the High Seas Act allows the personal representative of any person who dies as the result of a "wrongful act, neglect, or default occurring on the high seas," to sue "for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C. App. § 761.[1] The next section limits recovery to "a fair and just compensation for the pecuniary loss sustained by the persons for whose

[1] Section 761 states in full:

> Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued.

benefit the suit is brought." *Id.* § 762.[2] Other sections establish a limitations period, *id.* § 763a, govern actions under foreign law, *id.* § 764, permit a personal injury suit to continue under the Act if the plaintiff dies while the action is pending, *id.* § 765, bar contributory negligence as a complete defense, *id.* § 766, exempt the Great Lakes and state territorial waters from the Act's coverage, *id.* § 767, and preserve certain state law remedies and state court jurisdiction, *id.*; *see also Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 220-33 (1986).

That the Death on the High Seas Act does not permit recovery for a decedent's pre-death pain and suffering is clear enough. The Act provides a remedy only for injuries suffered by a limited class of surviving relatives, not the decedent. It is, after all, a "wrongful death" statute, giving survivors a right of action for losses they suffered as a result of the decedent's death, not a "survival" statute, allowing a decedent's estate to recover for injuries suffered by the decedent. *See Nelson v. American Nat'l Red Cross*, 26 F.3d 193, 199 (D.C. Cir. 1994); *Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 637 (3d Cir. 1994), *aff'd*, 116 S. Ct. 619 (1996); *McInnis v. Provident Life & Accident*

[2] Section 762 provides:

> The recovery in such suit shall be a fair and just compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought and shall be apportioned among them by the court in proportion to the loss they may severally have suffered by reason of the death of the person by whose representative the suit is brought.

Ins. Co., 21 F.3d 586, 589 (4th Cir. 1994). Pain and suffering is, in any event, nonpecuniary.[3] On the other hand, § 762 of the Act permits only the recovery of "compensation for . . . pecuniary loss sustained."

Plaintiffs do not quarrel with any of this. But, they say, the Death on the High Seas Act is not the only pertinent source of U.S. law. As they see it, "general maritime law" – a species of federal common law – also applies and it allows a survival action for pre-death pain and suffering independent of any action under the Death on the High Seas Act.

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[3] Courts often point to pain and suffering as an example of a nonpecuniary loss. *See, e.g., Eastern Airlines, Inc. v. Floyd*, 499 U.S. 530, 544 n.10 (1991); *Scarfo v. Cabletron Sys., Inc.*, 54 F.3d 931, 939 (1st Cir. 1995); *Korean Air Lines Disaster*, 932 F.2d at 1487. It is therefore strange to find several cases under the Jones Act, 46 U.S.C. App. § 688, describing damages for pre-death pain and suffering as pecuniary. *See, e.g., Furka v. Great Lakes Dredge & Dock Co.*, 755 F.2d 1085, 1090 n.7 (4th Cir. 1985); *Neal v. Barisich, Inc.*, 707 F. Supp. 862, 867 (E.D.La.), *aff'd*, 889 F.2d 273 (5th Cir. 1989). The Jones Act applies the Federal Employers' Liability Act, 45 U.S.C. § 51 *et seq.* ("FELA"), to seamen. While FELA and the Jones Act permit only pecuniary wrongful death damages, *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990); *Michigan Cent. R.R. v. Vreeland*, 227 U.S. 59, 68-71 (1913), FELA contains a survival provision (45 U.S.C. § 59) allowing recovery of damages for pre-death pain and suffering, *see St. Louis, Iron Mountain & Southern Ry. v. Craft*, 237 U.S. 648, 658 (1915). Rather than mislabeling pain and suffering as a pecuniary loss in Jones Act cases, it would be more accurate to recognize that under FELA and the Jones Act only wrongful death damages, not survival damages, need be pecuniary. *See Cook v. Ross Island Sand & Gravel Co.*, 626 F.2d 746, 748-49 (9th Cir. 1980).

The Supreme Court identified a wrongful death cause of action under the general maritime law in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970). The death in *Moragne* occurred in waters within the state of Florida, *id.* at 376, so the Death on the High Seas Act did not apply. The Court held that general maritime law nevertheless provided the decedent's widow with a remedy for wrongful death caused by a violation of federal maritime duties. *Id.* at 409. In *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 585-90 (1974), in which the death occurred in Louisiana waters, the Court held that recovery in a *Moragne* wrongful death action is not limited to pecuniary damages, as it is in actions under the Death on the High Seas Act. (Although the Court permitted nonpecuniary damages for loss of society in *Gaudet*, it said that "mental anguish or grief . . . is not compensable under the maritime wrongful-death remedy," 414 U.S. at 585 n.17.) A few years after *Gaudet*, the Court held that if a death occurs on the high seas, the Death on the High Seas Act, not general maritime law, governs and therefore nonpecuniary wrongful death damages may not be recovered. *Mobil Oil Co. v. Higginbotham*, 436 U.S. 618, 622-26 (1978).

The Supreme Court has declined to say whether the reasoning of *Moragne* may be extended to permit a survival cause of action under the general maritime law. *See Yamaha Motor Corp., U.S.A. v. Calhoun*, 116 S. Ct. 619, 625 n.7 (1996); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 34 (1990). We have never addressed the issue. Other courts of appeals have and a majority of them recognize survival actions. *See, e.g., Barbe v. Drummond*, 507 F.2d 794, 799-800 (1st Cir. 1974); *Wahlstrom v. Kawasaki Heavy Indus., Ltd.*, 4

F.3d 1084, 1093 (2d Cir. 1993); *Ward v. Union Barge Line Corp.*, 443 F.2d 565, 569 (3d Cir. 1971), *overruled in part on other grounds by Cox v. Dravo Corp.*, 517 F.2d 620 (3d Cir. 1975) (en banc); *Greene v. Vantage S.S. Corp.*, 466 F.2d 159, 166 (4th Cir. 1972); *Miles v. Melrose*, 882 F.2d 976, 986 (5th Cir. 1989), *aff'd sub nom. Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990); *Spiller v. Thomas M. Lowe, Jr., & Assocs., Inc.*, 466 F.2d 903, 909 (8th Cir. 1972); *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985); *Self v. Great Lakes Dredge & Dock Co.*, 832 F.2d 1540, 1549 (11th Cir. 1987).

Three courts of appeals have dealt with the availability of a general maritime law survival action for deaths on the high seas. The First and Fifth Circuits have permitted general maritime law survival actions in cases in which the Death on the High Seas Act also applies. *See Azzopardi v. Ocean Drilling & Exploration Co.*, 742 F.2d 890, 893-94 (5th Cir. 1984); *Barbe*, 507 F.2d at 799-800. The Ninth Circuit reached the opposite conclusion. *See Saavedra v. Korean Air Lines Co.*, 93 F.3d 547, 553-54 (9th Cir. 1996).[4] We believe the Ninth Circuit got it right.

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[4] Like the general maritime law, state wrongful death statutes may not be used to supplement Death on the High Seas Act remedies with nonpecuniary damages. *Tallentire*, 477 U.S. at 232. And although the Supreme Court has held that state survival and wrongful death statutes apply to at least some deaths occurring in territorial waters, *Yamaha*, 116 S. Ct. at 626-29, it has not said whether state survival statutes can apply to deaths on the high seas, *see Tallentire*, 477 U.S. at 215 n.1. A few lower courts have allowed recovery under a state survival statute to supplement recovery under the Death on the High Seas Act. *See, e.g., Solomon v. Warren*, 540 F.2d 777, 792 n.20 (5th Cir. 1976); *Dugas v. National Aircraft Corp.*, 438 F.2d 1386, 1388-92 (3d Cir. 1971).

Assume general maritime law provides a survival action in some cases (we do not decide whether it does). Still, the effect of the Supreme Court's decision in *Higginbotham* must be evaluated. Nonpecuniary damages may be recovered under general maritime law, but not, the Court held, when the death is on the high seas. Then the Death on the High Seas Act controls and the judiciary may not evaluate the policy arguments in favor of, or against, allowing nonpecuniary damages. "Congress has struck the balance for us. It has limited survivors to recovery of their pecuniary losses." *Higginbotham*, 436 U.S. at 623. "The Death on the High Seas Act . . . announces Congress' considered judgment on such issues as the beneficiaries, the limitations period, contributory negligence, survival, and damages." *Id.* at 625. *Moragne* developed general maritime law in a space Congress had not occupied. But "[t]here is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted. In the area covered by the statute, it would be no more appropriate to prescribe a different measure of damages than to prescribe a different statute of limitations, or a different class of beneficiaries." *Id.*

Higginbotham thus instructs the lower federal courts not to extend the general maritime law to areas in which Congress has already legislated. For deaths on the high seas, Congress decided who may sue and for what. Judge-made general maritime law may not override such congressional judgments, however ancient those judgments may happen to be. Congress made the law and it is up to Congress to change it.

At almost the same time as the Sixty-Sixth Congress passed the Death on the High Seas Act, it enacted the Jones Act, 46 U.S.C. App. § 688. *See* Death on the High Seas Act, ch. 111, 41 Stat. 537 (1920); Merchant Marine (Jones) Act, ch. 250, § 33, 41 Stat. 988, 1007 (1920). The Jones Act contains a survival provision applicable to certain maritime deaths. *See supra* note 3. A fair assumption is that the members of Congress who passed the Death on the High Seas Act understood the difference between wrongful death and survival actions. Their inclusion of a survival remedy in the Jones Act but not in the Death on the High Seas Act scarcely seems inadvertent.

Higginbotham stated that the Death on the High Seas Act expressed a congressional "judgment on such issues as . . . survival, and damages." 436 U.S. at 625. In support, the Court cross-referenced a footnote citing 46 U.S.C. App. § 765, a provision allowing a personal injury suit, initiated by a plaintiff who dies while the suit is pending, to be continued under the Act. A law professor has criticized the Court's statement as "casual," or "at best dictum and conceivably nothing more than an ill-advised gratuitous remark." Joseph F. Smith, Jr., *A Maritime Law Survival Remedy: Is There Life After Higginbotham?*, 6 MAR. LAW. 185, 196, 198 (1981). Dictum yes, ill-advised no. That the Death on the High Seas Act contains only a very limited survival provision is no reason for treating the Act as something other than an expression of legislative judgment on the extent to which survival actions are to be permitted. When Congress decides to go only so far it necessarily has decided to go no further.[5]

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[5] One of the drafters of the Death on the High Seas Act explained the Act's unusual, limited survival provision. The Act originally required suits to be filed "within two years from the date of [the] wrongful act, neglect, or default." Ch. 111, § 3, 41 Stat. 537. The survival provision of § 765 preserved for defendants the benefits of the Act's restricted limitations period without creating an undue barrier for wrongful death actions in cases in which the death did not occur soon after the event causing the injury. In such cases, a suit filed within two years while the decedent was still alive would preserve the action. *See* Robert M. Hughes, *Death Actions in Admiralty*, 31 YALE L.J. 115, 126 (1921).

While the contours of plaintiffs' proposed survival action for deaths on the high seas are uncertain, they presumably would allow a decedent's estate to recover compensation for the decedent's injuries. This would necessarily expand the class of beneficiaries in the Death on the High Seas Act, which does not include decedents' estates. Yet *Higginbotham* held that "it would be no more appropriate to prescribe a different measure of damages than to prescribe . . . a different class of beneficiaries." 436 U.S. at 625. It was, to the Court, unthinkable that a legislatively-mandated class of beneficiaries could be judicially altered. Suits under the Act are "for the *exclusive* benefit of the decedent's wife, husband, parent, child, or dependent relative." 46 U.S.C. App. § 761 (emphasis added). In a death on the high seas case, there is no relevant difference between a court's giving a decedent's nondependent niece a right of action under general maritime law, which is clearly impermissible, and allowing the decedent's estate to sue for the decedent's injuries under the general maritime law.

Perhaps plaintiffs envisage a survival action that would not alter the Death on the High Seas Act's beneficiary class. One might permit a decedent's personal representative to sue for damages suffered by the decedent, but only for the benefit of those named in the Act. For example, the Federal Employers' Liability Act and the Jones Act give a decedent's personal representative the right to recover survival damages for the benefit of a fixed class of surviving relatives. *See* 45 U.S.C. § 59; 46 U.S.C. App. § 688.[6] Such an approach could leave the Death on the High Seas Act's beneficiary class intact. But it would change the damages available to the Act's beneficiaries. No longer would damages be limited to "compensation for the pecuniary loss sustained by the persons for whose benefit the suit is brought," 46 U.S.C. App. § 762. The beneficiaries would also receive compensation for nonpecuniary losses sustained by others – their decedents. That result *Higginbotham* forecloses.

Because the Death on the High Seas Act is a "wrongful death" statute, plaintiffs insist it has no bearing on survival remedies. They have missed the point. That the Act provides remedies only to certain surviving relatives for their losses and provides no compensation for the decedent's own losses is the very reason why courts may

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[6] Under 45 U.S.C. § 59:

> Any right of action given by this chapter to a person suffering injury shall survive to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee, and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee. . . .

not create a survival remedy. The Act explicitly limits beneficiaries to a particular group of surviving relatives, and it explicitly limits the recoverable damages to pecuniary losses suffered by the members of that group. These are the limits of recovery and a court may neither expand nor contract them. Calling the Act a wrongful death statute does nothing more than describe the manner in which Congress restricted the beneficiary class and the recoverable damages. It does not deprive those restrictions of their significance.

Plaintiffs also offer comparisons to the Jones Act, emphasizing that general maritime law remedies exist alongside Jones Act statutory remedies. The Jones Act provides compensation to seamen injured as a result of negligence, and in the event of death it provides both a wrongful death and a survival action. *See* 46 U.S.C. App. § 688; 45 U.S.C. §§ 51, 59. In *Miles*, the Supreme Court held that after *Moragne* a seaman's survivors could pursue a general maritime law wrongful death action alleging unseaworthiness (a strict liability theory), in addition to a Jones Act negligence claim. *Miles*, 498 U.S. at 29-30. Plaintiffs may have identified an inconsistency in how the Court treats the Jones Act and how it treats the Death on High Seas Act. But this case involves the Death on the High Seas Act, and we therefore are bound to follow *Higginbotham*. Moreover, *Miles* severely restricted the extent to which the general maritime law may expand the remedies available under the Jones Act. Relying on *Higginbotham*, the Court refused to allow the decedent's survivors to recover nonpecuniary wrongful death damages under the general maritime law because they could not recover such damages under the Jones Act. *Miles*, 498 U.S.

at 30-33. So while the general maritime law permits recovery for violations of duties other than those imposed by the Jones Act, such recovery may not exceed the recovery that would be available under the Jones Act if it applied. It is thus uncertain how much mileage plaintiffs could get out of their Jones Act analogy even if we disregarded the Court's pronouncements in *Higginbotham*.

II

Plaintiffs invoke South Korean law on the basis of this provision of the Death on the High Seas Act:

> Whenever a right of action is granted by the law of any foreign State on account of death by wrongful act, neglect, or default occurring upon the high seas, such right may be maintained in an appropriate action in admiralty in the courts of the United States without abatement in respect to the amount for which recovery is authorized, any statute of the United States to the contrary notwithstanding.

46 U.S.C. App. § 764. As plaintiffs read § 764, it allows them to use an action under the Death on the High Seas Act to assert claims cognizable under foreign law. They have submitted the statement of a South Korean attorney that South Korean law would allow the recovery of damages for the decedents' pre-death pain and suffering and for the surviving relatives' mental anguish. The district court rejected the plaintiffs' submission as "irrelevant" in light of its determination that U.S. law applied. *Korean Air Lines Disaster*, 935 F. Supp. at 14 n.2.

The case law regarding § 764 is not uniform. Some opinions seem to support plaintiffs' view of § 764. *See Heath v. American Sail Training Ass'n*, 644 F. Supp. 1459, 1467 (D.R.I. 1986); *Noel v. Linea Aeropostal Venezolana*, 260 F. Supp. 1002, 1004-06 (S.D.N.Y. 1966); *Fernandez v. Linea Aeropostal Venezolana*, 156 F. Supp. 94, 96 (S.D.N.Y. 1957); *lafrate v. Compagnie Generale Transatlantique*, 106 F. Supp. 619, 622 (S.D.N.Y. 1952). Other opinions support the view that § 761 and § 764 are mutually exclusive and that plaintiffs therefore may not simultaneously advance claims under both U.S. and foreign law. *See In re Air Crash Disaster Near Bombay, India on Jan. 1, 1978*, 531 F. Supp. 1175, 1185-88 (W.D.Wash. 1982); *Bergeron v. Koninklijke Luchtvaart Maatschappij, N.V.*, 188 F. Supp. 594, 596-97 (S.D.N.Y. 1960), *appeal dismissed*, 299 F.2d 78 (2d Cir. 1962); *The Vulcania*, 41 F. Supp. 849 (S.D.N.Y. 1941), *modifying* 32 F. Supp. 815 (S.D.N.Y. 1940); *The Vestris*, 53 F.2d 847, 855-56 (S.D.N.Y. 1931).

If plaintiffs were correct, § 764 would license them to pick and choose among provisions of U.S. and South Korean law in order to assemble the most favorable package of rights against the defendant. That would be odd enough. But stranger still is the notion that South Korean law has any bearing on this case. Faced with *Zicherman*'s directive to make a choice-of-law determination, 116 S. Ct. at 637, the district court chose U.S. law, not South Korean law. Plaintiffs have not appealed this ruling. So how does South Korean law enter the picture? True, § 764 permits suits under foreign law when "a right of action is granted by the law of any foreign State." Since U.S. law, not South Korean law (or French law or Brazilian law), applies to this case, we are at a loss to understand how "a

right of action is granted by the law of " South Korea or any other foreign country. If South Korean law does not apply to a suit, it can hardly grant rights to the parties. Once the choice-of-law determination is in favor of U.S. law, only U.S. law can grant plaintiffs any sort of right of action.

It is fair to ask what function § 764 serves if not the one plaintiffs imagine. If, as we have decided, § 764 cannot be used to inject foreign law into a case controlled by U.S. law, one might suppose it has no purpose. When foreign law governs a case, the court would not consider the various provisions of the Death on the High Seas Act. But § 764 is not without significance.

The provision originated as an amendment recommended by the Senate Committee on the Judiciary. The Committee's report took the position (no longer current) that Congress had no power to create a right of action allowing the recovery of damages against foreigners or foreign vessels for deaths occurring on the high seas. S. REP. No. 66-216, at 4 (1919). The report also recognized that American courts permitted suits concerning foreign vessels to proceed under the law of the vessel's home country. *Id.* at 4-5. For example, the claims in *La Bourgogne*, 210 U.S. 95 (1908), were against a French vessel and its owners for deaths occurring on the high seas. The Supreme Court held that while U.S. law at that time did not recognize a wrongful death cause of action, wrongful death damages were available under French law in a proceeding in a U.S. court. *Id.* at 138-40. Section 764 was the legislative response to decisions permitting the owners of such foreign vessels to take advantage of U.S. statutes limiting their liability, *see, e.g., Oceanic Steam*

Navigation Co. v. Mellor, 233 U.S. 718, 731 (1914) (*"The Titanic"*).[7] The Committee report explained § 764 this way: "[A]s the Supreme Court has held that the limited liability statute of the United States applies to foreign ships seeking such limitation of liability in our courts, the committee recommends that the bill be amended by the insertion of [§ 764]." S. REP. No. 66-216, at 5.

It was immediately recognized that § 764 was "superfluous" insofar as it provided that U.S. courts would hear suits under foreign law in cases involving foreign vessels. Hughes, *supra*, 31 YALE L.J. at 118, 122; *see also* Calvert Magruder & Marshall Grout, *Wrongful Death Within the Admiralty Jurisdiction*, 35 YALE L.J. 395, 423-24 (1926). As the Senate Committee realized, that was already the practice. The real force of § 764 was its barring foreign vessel owners from taking advantage of American limitation of liability laws.

Another function of § 764, not discussed in the legislative history, is to require foreign law actions for wrongful deaths on the high seas to be brought in admiralty, at least if the plaintiffs wish to prevent the defendants from limiting their liability. *See The Silverpalm*, 79 F.2d 598, 600 (9th Cir. 1935); *Bergeron*, 188 F. Supp. at 597-98; *Iafrate*, 106 F. Supp. at 621-22; *Egan v. Donaldson Atlantic Line*, 37 F. Supp. 909 (S.D.N.Y. 1941). *But see Powers v. Cunard S.S. Co.*, 32 F.2d 720 (S.D.N.Y. 1925).

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[7] Under Rev. Stat. § 4283 (1878) (current version at 46 U.S.C. App. § 183), when a loss or injury occurred "without the privity, or knowledge" of a vessel owner, the owner could limit its liability to the value of its interest in the vessel and "her freight then pending."

Section 764 also made it explicit that American courts would continue to hear these suits under foreign law. While the courts' authority to do so did not depend on § 764, without § 764 the Death on the High Seas Act would have been open to the judicial interpretation that it was a congressional attempt – albeit an illegitimate one in the eyes of the Senate Committee – to impose a new American law of wrongful death on all suits brought in U.S. courts, including those against foreign defendants. Some maritime statutes of the period explicitly applied to foreigners and their vessels. *See, e.g.*, Act of Mar. 4, 1915, ch. 153, § 4, 38 Stat. 1164, 1165. Others, like the limitation of liability statute (which at that time applied to "the owner of any vessel," Rev. Stat. § 4283), were less clear on the point, but the courts interpreted them to apply to foreigners as well as Americans, *see, e.g., The Titanic*, 233 U.S. at 731. Thus, § 764 made it certain that the substantive provisions of the Death on the High Seas Act were not to displace foreign law in those cases in which foreign law already applied.

We therefore find no reason for concluding that § 764 requires the abandonment of normal choice-of-law principles, as plaintiffs suggest, allowing them to combine the most favorable elements of U.S. law, South Korean law, and perhaps also any other nation's law. Section 764 and foreign law play no role once a court determines that U.S. law governs an action.

Affirmed.

United States Court of Appeals
For The District of Columbia Circuit

No. 96-5278 **September Term, 1996**
83ms00345

In re: Korean Airlines Disaster of September 1, 1983,

BEFORE: Wald and Randolph, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

(Filed Aug. 28, 1997)

Upon consideration of appellants' petition for rehearing filed August 7, 1997, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 96-5278 **September Term, 1996**
83ms00345

In re: Korean Airlines Disaster of September 1, 1983,

BEFORE: Edwards, Chief Judge; Wald, Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges, and Buckley, Senior Circuit Judge

ORDER

(Filed Aug. 28, 1997)

Upon consideration of appellants' Suggestion for Rehearing *In Banc*, and the absence of a request by any member of the court for a vote, it is

ORDERED that the suggestion be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/ Robert A. Bonner
Robert A. Bonner
Deputy Clerk
